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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~664~~ 29

GIACOMO REINA, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 27, 1960
CERTIORARI GRANTED APRIL 4, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 27, 1960

[fol. A]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

GIACOMO REINA, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant's Appendix—Filed October 8, 1959

[File endorsement omitted]

[fol. 4]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

In Re

GIACOMO REINA

NOTICE OF HEARING OF APPLICATION FOR ORDER DIRECTING GIACOMO REINA TO TESTIFY AND PRODUCE EVIDENCE—December 8, 1958

Please take notice, that the undersigned will bring the attached application on for hearing before this court at Room 318, United States Court House, Foley Square, City of New York, on the 10th day of December 1958, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Arthur H. Christy, United States Attorney for the Southern District of New York, By Edward Brodsky, Special Attorney.

Special Attorney Edward Brodsky, Room 607H, Tel. No. CO 7-7100 X 468

[fol. 5]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

APPLICATION FOR ORDER INSTRUCTING GIACOMO REINA TO TESTIFY AND PRODUCE EVIDENCE December 8, 1958

Arthur H. Christy, United States Attorney for the Southern District of New York, hereby makes application for an order instructing Giacomo Reina to testify and produce evidence, pursuant to the provision of Title 18, United States Code, Section 1406, and respectfully alleges as follows:

1. Giacomo Reina was subpoenaed to appear and did appear on the 5th day of December 1958, before a duly constituted Grand Jury of the Southern District of New York, sitting at New York, New York. This Grand Jury was then and there inquiring into alleged violations of the laws relating to narcotics, as set forth in Title 18, United States Code, Section 1406, in the Southern District of New York and elsewhere.

2. The Grand Jury asked Giacomo Reina the following questions, among others, relating to the above matters:

Mr. Reina, on March 21, 1956 you, along with Pasquale Moccio, Joseph Valachi, Pasquale Pagano and Lawrence Quartiero were convicted of conspiring to violate the narcotics laws. You received a jail sentence of five years, a fine of $10,000 and you are now incarcerated in the Federal Penitentiary at Atlanta, Georgia.

From who did the group with which you were associated obtain the narcotics involved in that case?

[fol. 6] Under what circumstances did you first meet Eugene Giannini?

What are the names of the seamen on the New York waterfront from whom you and Eugene Giannini obtained narcotics?

Under what circumstances did you and Eugene Giannini first meet those seamen?

Mr. Reina, the Government has information that in March or April 1950 you, along with Eugene Giannini and Salvatore Shillitani, commenced buying heroin from a French group including Marius Ansaldi, Francois Paoleschi, Dominique Reissent, Joseph Orsini, Francois Spirito, Antoine D'Agostino, and Jean Laget.

Who are the people in this French group whose names I have omitted?

Under what circumstances did you first meet each of those French nationals?

When did each of those French nationals start to supply you with narcotics?

Who else in the United States did this group supply with narcotics?

How was the narcotics transported from Europe to the United States?

Who transported the narcotics to the United States?

How was the narcotics received from Europe disposed of in the United States?

Under what circumstances did you first meet Anthony Strollo, also known as Tony Bender?

Did Anthony Strollo or anyone working with or for him ever receive narcotics from any of the French nationals mentioned above?

Under what circumstances did you first meet Vincent Mauro also known as Jimmy Bruno?

Did Vincent Mauro or anyone working with or for him ever receive narcotics from any of the French nationals mentioned previously?

[fol. 7] Mr. Reina, the Government has information that a group of persons including you, Eugene Giannini and Salavtore Shillitani purchased at least six automobiles to be sent to Europe with couriers in order to obtain narcotics.

What is the name of each courier who went to Europe to obtain narcotics?

Did each automobile have a hidden compartment in it?

Who built the hidden compartment in each automobile?

In June 1950 did you, along with Francois Spirito and Eugene Giannini send John Palumbo and his mother Angelina Corona to Europe with a 1946 Packard automobile?

Were John Palumbo and his mother acting as couriers to obtain narcotics for you?

Were John Palumbo and his mother told that they were being sent to Europe to obtain narcotics?

Did they obtain narcotics in Europe?

Was the narcotics they obtained brought to the United States?

How was the narcotics obtained by them disposed of?

Who financed the trip?

Who bought the 1946 Packard car which was used by John Palumbo and his mother?

Mr. Reina, the Government has information that the rear door panels on the 1946 Packard were, unlike other cars, easily removable without any tool. With the panel free there was easy access to a hollow space formed by the body construction of the door.

Who prepared the removable door panel?

Was the hollow space used to hide narcotics?

During June 1950, did you arrange and finance a [fol. 8] trip to Salerno, Italy, with a 1949 Packard, for Louis Pacella, his wife, Jennie, and his mother, Maria?

Were any or all of them told to obtain narcotics in Italy?

Who did you tell them to contact in order to obtain narcotics?

Was narcotics obtained by them and brought to you in the United States?

How did you dispose of the narcotics?

Mr. Reina, the Government has information that the 1949 Packard had a hidden compartment in the back of the rear arm rest on the right side. The arm rest was made removable and, behind it, the upholstery was cut, thereby giving access to the area immediately below and above the right rear fender. The compartment is estimated as being capable of secreting about fifteen kilograms of narcotics.

Who prepared the compartment?

How many times was the 1949 Packard sent to Europe for the purpose of obtaining narcotics?

Who, besides Louis Pacella, his wife and his mother traveled to Europe with the 1949 Packard in order to obtain narcotics?

Mr. Reina, under what circumstances did you first meet Johanna Sophie Gross?

In November 1950 did you arrange to send Johanna Sophie Gross to Europe to further your smuggling activities?

Who did you tell her to contact in Europe?

Did she bring back narcotics from Europe between

November 1950 and January 1951 and hand it over to you?

How was the narcotics disposed of?

In May 1952 did you and Eugene Giannini arrange for Johanna Sophie Gross to travel to Salerno, Italy, [fol. 9] where she was to meet Giannini's brother-in-law, Joseph Pelligrino, and Genero Rizzo in order to obtain narcotics?

Did Johanna Sophie Gross obtain 4 kilograms of heroin from Joseph Pelligrino and Genero Rizzo on that trip?

How was the heroin disposed of?

Did Anthony Strollo or Vincent Mauro know of, or have anything to do with, the narcotics obtained by Johanna Sophie Gross on the aforementioned trip to Europe?

Mr. Reina, under what circumstances did you first meet Pasquale Cappaso?

Did Pasquale Cappaso travel to Europe in July 1951 at either your or Eugene Giannini's instructions?

Did you or Eugene Giannini tell Pasquale Cappaso to obtain about four kilograms of heroin on that trip?

From whom was the heroin obtained in Europe?

How was the heroin paid for?

After it was delivered to you in the United States how was it disposed of?

In July 1950 did you travel to France and, at the same time, have your Cadillac automobile shipped to France?

While in Europe did you obtain narcotics?

From whom did you obtain narcotics?

Did you return to the United States by air on August 12, 1950?

Was any narcotics brought back to the United States either by you or in your automobile?

How was the narcotics disposed of?

Mr. Reina, the Government has information that each member of the narcotics organization with which you were associated invested $10,000 at the beginning of the venture.

[fol. 10] When did the venture start?

What is the name of each person who invested $10,000?

Who took possession of the money?

Were any books or records of income and expenses maintained?

Who transported money to Europe to pay for narcotics purchased?

In what form was the money carried, for example, cash, check, money order?

Mr. Reina, the Government has information that during 1950 and 1951 you, Eugene Giannini, your brother Andrea, Mr. and Mrs. Louis Pacella, Mrs. Maria Pacella, Angelina Corona, John Palumbo, Madeline Valenti and Johanna S. Gross all obtained passports through Charles Spar, a member of the New York Bar.

Did Mr. Spar render any other service to you besides obtain passports?

Did Mr. Spar know that the persons for whom he obtained passports were engaged in the narcotics business?

Did you ever discuss narcotics with Mr. Spar?

What are the names of the other members of your narcotics group, besides the persons previously named, who obtained passports through Charles Spar?

Is your sister, Mildred, married to Joseph Valachi, also known as Joe Cago?

Did Joseph Valachi ever travel to Europe to acquire narcotics?

Did Joseph Valachi invest $10,000 in the narcotics venture in which you were engaged?

Did Joseph Valachi ever supply you with narcotics?

Did you ever supply Joseph Valachi with narcotics?

Mr. Reina, was your father, Thomas, a member of the organization sometimes called the "Mafia"?

[fol. 11] Did your father have the title "Don" in that organization?

After your father's death, did you take his place and his title of "Don" in the organization?

What are the names of the members of the organization?

Mr. Reina, the Government has information that at the time of your arrest on February 25, 1955 you were a member of an organization including Eugene Giannini, Salvatore Shillitani and Pasquale Pagano, which imported narcotics into the United States.

What is the name of each member of the organization who I have omitted?

What was Anthony Strollo's role in this organization?

What was Vincent Mauro's role in this organization?

What was Joe Valachi's role in this organization?

Under what circumstances did you first meet John Stopelli?

In 1953 did John Stopelli, Vincent Mauro and Pasquale Moccio work together importing narcotics into the United States?

Do you know any of the following persons?

Joseph Bendenelli	Albert Corrado
Rocco Mazzei	Vincent Randazzo
Vincent Squillante	Louis Pacella
Frank Borelli	Ralph Ciccone
Anthony Castaldi	Fiere Siano

Fred Berry

As to any you know, state whether he is or was engaged in narcotics?

3. Giacomo Reina refused to answer the above questions on the ground that his answers might tend to incriminate him.

[fol. 12] 4. In my judgment as United States Attorney for the Southern District of New York, the testimony of Giacomo Reina is necessary and material to the investigation now being conducted by the Grand Jury with respect to the alleged narcotics violations. The pursuit of investigations such as this was exactly what Congress had in mind when it enacted this immunity statute. It is further my judgment that the testimony of Giacomo Reina concerning the matters under inquiry and his responses to the above questions are necessary to the public interest of the United States.

5. This application is made in good faith, and with the approval of William Rogers, Attorney General of the United States. A copy of a letter from the Attorney General expressing such approval is attached hereto as Exhibit A.

6. Because the questions herein cover facts about persons not presently before this Court, and because the nature and content of the proceeding before this Grand Jury should be kept confidential, subject to the proper objection of any person aggrieved thereby, it is respectfully requested that this application be sealed, subject to further order of the Court, or any Judge thereof.

Wherefore, I Arthur H. Christy, United States Attorney for the Southern District of New York, request the Court to order Giacomo Reina to answer the above questions and to testify and produce evidence relating to the matters under inquiry, pursuant to the provisions of Title 18, United States Code, Section 1406.

Arthur H. Christy, United States Attorney.

Dated New York, N. Y., December 8, 1958.

[fol. 13]

CERTIFICATE OF EDWARD BRODSKY DATED DECEMBER 8, 1958

Edward Brodsky, Special Attorney, Department of Justice, hereby certifies upon personal knowledge as follows:

1. Giacomo Reina was subpoened to appear and did appear on the 5th day of December, 1958, before a duly constituted Grand Jury of the Southern District of New York, sitting at New York, New York. This Grand Jury was then and there inquiring into alleged violations of the laws relating to narcotics, as set forth in Title 18, United States Code, Section 1406, in the Southern District of New York and elsewhere.

2. The Grand Jury asked Mr. Reina the questions set forth in the attached application for an order instructing

Giacomo Reina to testify and produce evidence pursuant to the provision of Title 18, United States Code, Section 1406.

3. Giacomo Reina refused to answer the above questions on the ground that his answers might tend to incriminate him.

4. Because the questions herein cover facts about persons not presently before this Court, and because the [fol. 14] nature and contents of the proceeding before this Grand Jury should be kept confidential, subject to the proper objection of any person aggrieved thereby, it is respectfully requested that this application be sealed, subject to further order of the Court, or any Judge thereof.

Dated: New York, N. Y., December 8, 1958.

Edward Brodsky, Special Attorney, Department of Justice.

[fol. 15]

EXHIBIT "A" ANNEXED TO APPLICATION

December 8, 1958

Arthur H. Christy, Esquire
United States Attorney
New York, New York

Dear Mr. Christy:

It is my understanding that on December 5, 1958, GIACOMO REINA appeared before a Grand Jury in the Southern District of New York which is inquiring into alleged violations of the laws relating to narcotics, as set forth in Title 18, United States Code, Section 1406. It is my further understanding that GIACOMO REINA refused to answer material questions on the ground of the privilege against self-incrimination afforded him by the Fifth Amendment to the Constitution of the United States.

You have informed me that it is your judgment that the testimony of GIACOMO REINA is necessary to the public interest. With this judgment, I am in complete accord. You are, therefore, authorized to make Application to the United States District Court for the Southern District of

New York for an order instructing the witness to testify and produce evidence, pursuant to the provisions of Title 18, United States Code, Section 1406.

Sincerely,

WILLIAM P. ROGERS
Attorney General

[fol. 16]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER OF EDELSTEIN, *D.J.*, DATED DECEMBER 17, 1958

Arthur H. Christy, United States Attorney for the Southern District of New York, having on the 10th day of December 1958, made an Application, orally and in writing, upon notice to Giacomo Reina, a witness appearing before a Grand Jury of the Southern District of New York then inquiring into alleged violations of the laws relating to Narcotics, as set forth in Title 18, United States Code, Section 1406, in the Southern District of New York and elsewhere, for an Order instructing said Giacomo Reina to testify and produce evidence before said Grand Jury pursuant to the provisions of Title 18, United States Code, Section 1406, as amended, and said Application having duly come on to be heard before this Court on the 10th day of December 1958.

Now, upon reading the written Application of Arthur H. Christy, the United States Attorney in and for the Southern District of New York, the approval of the Attorney General of the United States to said Application dated 8th day of December 1958, the Certificate of Special Attorney Edward Brodsky, dated the 8th day of December 1958, all submitted in support of said Application, and due deliberation having been had thereon, and it appearing as follows:

1. Giacomo Reina was subpoenaed to appear and did appear on the 5th day of December 1958, before a duly constituted Grand Jury of the Southern District of New York.

[fol. 17] 2. The Grand Jury was then and there inquiring into alleged violations of the laws relating to Narcotics, as set forth in Title 18, United States Code, Section 1406, in the Southern District of New York and elsewhere;

3. Giacomo Reina refused to answer certain questions relating to matters under inquiry before said Grand Jury and specifically set forth in the aforesaid Application on the ground that his answers might tend to incriminate him;

4. In the judgment of the United States Attorney the testimony of the said witness concerning the aforesaid matters is necessary to the public interest of the United States; and

5. Said Application for an Order that the witness shall be instructed to testify or produce evidence subject to the provisions of Title 18, United States Code, Section 1406, was made with the approval of the Attorney General of the United States;

it is

Ordered that Giacomo Reina appear as a witness before said Grand Jury at Room 608 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 12th day of January 1959, at 10:00 o'clock in the forenoon; and it is further

Ordered, subject to the provisions of Title 18, United States Code, Section 1406, as amended, that Giacomo Reina be, and he hereby is, instructed to answer the questions propounded to him before the Grand Jury and to testify [fol. 18] and produce evidence with respect to such matters under inquiry before said Grand Jury; (and it is further

Ordered that the papers filed herein shall be sealed subject to the further order of the United States District Court for the Southern District of New York, or any Judge thereof.)

Dated: New York, New York, December 17, 1958.

David Edelstein, United States District Judge.

[fol. 19]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER TO SHOW CAUSE TO PUNISH FOR CONTEMPT OF COURT—JANUARY 15, 1959

Upon the application of Arthur H. Christy, United States Attorney for the Southern District of New York, and annexed certificate of Edward Brodsky, Special Attorney, Department of Justice, it appearing therefrom as follows:

1. Giacomo Reina was subpoenaed to appear and did appear on the 5th day of December 1958 before a duly constituted Grand Jury of the Southern District of New York;

2. The Grand Jury was then and there inquiring into alleged violations of the laws relating to narcotics as set forth in Title 18, United States Code, Section 1406;

3. Giacomo Reina refused to answer certain questions relating to matters under inquiry before said Grand Jury, which questions are set forth in the government's application, dated the 8th day of December 1958, for an order instructing Giacomo Reina to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Section 1406, a copy [fol. 20] of which is attached hereto and made a part hereof, and was served upon him;

4. On December 17, 1958, upon oral and written application of the United States Attorney, notice having been given, Giacomo Reina, was directed by Order of Hon. David N. Edelstein United States District Judge, to return to the Grand Jury on January 12, 1959 and answer said questions;

5. On January 15, 1959, after being adjourned, Giacomo Reina returned to the Grand Jury as directed, but then and there wilfully refused to answer the questions as directed, it is hereby

Ordered that Giacomo Reina show cause at a Term of this Court, to be held on the 21st day of January 1959, at 10:30 o'clock in the forenoon of that day at Room 318, United States Courthouse, Foley Square, New York City, or as soon thereafter as this matter may be heard, why he should not be adjudged and held in contempt of this Court, and punished for such contempt of this Court.

Service of this Order on the respondent or his counsel at any time prior to 10:00 o'clock on the 16th day of January 1959, shall be deemed sufficient.

A. O. Dawson, United States District Court Judge:

Dated: New York, N. Y., January 15, 1959.

[fol. 21]

CERTIFICATE OF EDWARD BRODSKY DATED JANUARY 15, 1959

Edward Brodsky, Special Attorney, Department of Justice, hereby certifies, upon personal knowledge, as follows:

1. Giacomo Reina was subpoenaed to appear and did appear on the 5th day of December 1958, before a duly constituted Grand Jury of the Southern District of New York;

2. The Grand Jury was then and there inquiring into alleged violations of the laws relating to narcotics, as set forth in Title 18, United States Code, Section 1406;

3. Giacomo Reina refused to answer certain questions relating to matters under inquiry before said Grand Jury, which questions are set forth in the government's application, dated the 8th day of December 1958, for an order instructing Giacomo Reina to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Section 1406, a copy of which is attached hereto and made a part hereof and was served upon him;

4. On December 17, 1958, upon oral and written application of the United States Attorney, notice having been given, Giacomo Reina was directed by Order of Honorable David N. Edelstein, United States Dis-

trict Judge to return to the Grand Jury on January 12, 1959 and answer said questions;

[fol. 22] 5. On January 15, 1959 after being adjourned, Giacomo Reina returned to the Grand Jury as directed, but then and there wilfully refused to answer the questions as directed.

Edward Brodsky, Special Attorney, Department of Justice.

Dated: New York, N. Y., January 15, 1959.

[fol. 23]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Cr. 158-80

Hearing on Motion to Punish for Contempt of Court

Before: Hon. Archie O. Dawson, District Judge.

New York, January 22, 1959, R. 318.

APPEARANCES:

Arthur H. Christy, Esq., United States Attorney, for the Government; By Milton H. Wessel, Esq., Edward Brodsky, Esq., and William Esbitt, Esq., Special Assistants to the Attorney General.

Moses L. Kove, Esq., Attorney for the Defendant.

The Court: Is the Government ready?

Mr. Brodsky: The Government is ready.

The Court: Is the defendant ready?

Mr. Kove: Yes, your Honor.

The Court: All right. This is a hearing?

Mr. Brodsky: Your Honor, this is a hearing pursuant to an order to show cause signed by your Honor on January

15, 1959, as to why Giacomo Reina should not be adjudged in contempt of this court.

[fol. 24] Reina is now serving a five-year sentence for violation of the Federal Narcotics Laws, appeared before a grand jury in this district on December 5, 1958. He was asked a series of questions, all of which related in some way to narcotics violations, and all of which are based on information which leads the Government to believe that he can answer truthfully the questions that were asked of him.

With respect to each question the witness refused to answer on the ground that his answers might tend to incriminate him.

On December 9, 1958, he returned to the grand jury and was given a second opportunity to answer all the questions. He refused to answer again on the ground that his testimony might tend to incriminate him.

At that time he was served with a notice to appear in the District Court on December 10, 1958, or such time thereafter as counsel could be heard. He was also served with an application for an order directing him to testify pursuant to the immunity provisions of the Federal Narcotics Control Act of 1956.

He also was served with a copy of the Attorney General's letter dated December 8, 1958, authorizing the United States Attorney for the Southern District of New York to make the application, and a certificate signed by me contained the facts surrounding the application

Subsequently the witness made two more short appearances before the grand jury. He then appeared with his attorney, Mr. Moses Kove, on December 17, 1958, before Judge Edelstein, and the Government applied to the court for an order directing him to testify pursuant to the immunity provisions of the Narcotics Control Act. Judge Edelstein directed the witness to return to the grand jury and answer all the questions which were propounded to him. Of course the witness would be immune from prosecution with respect to all transactions about which he testified.

[fol. 25] On January 15, 1959, the witness returned to the grand jury and stood mute with respect to all questions which were propounded to him. Your Honor signed an order to show cause why he should not be cited for con-

tempt on January 15, 1959, and we are now prepared to have a hearing on that order. I understand that Mr. Kove is willing to concede that the facts as I have stated them are correct.

Mr. Kove: That is so, your Honor.

The Court: I presume we better put it on the record.

Mr. Kove: That is entirely within your Honor's discretion. I might say to you now, sir, that I think that I am ready to concede that the facts as related by Mr. Brodsky are to my knowledge correct. I have suggested to him, subject to your Honor's approval, that I would concede, having been shown a transcript of the last appearance which is the subject matter of the order to show cause that if reflected the fact that he stood mute on that occasion, that I would concede for the record that that was so. The reason being, sir, and I think I should apprise the court of it at this time is that the defendant's desire that counsel, either myself or someone else, would take up the question of the constitutionality of the immunity section referred to. And it is on that basis, sir, that I say to you that there is not any question here abo :t, having stood mute on the last appearance before the grand jury—

The Court: Your defense will relate to the constitutionality?

Mr. Kove: That is correct, sir.

Mr. Brodsky: If your Honor please, we would like to put into the record the grand jury testimony of Giacomo Reina.

The Court: We will make a full record of this so there cannot be any question.

Mr. Kove: I would appreciate that, your Honor. Otherwise I do not know how I could get the record to go up with. [fol. 26] The Court: We will have to have a complete record, so there cannot be any question about it. I just wanted to make sure what the defendant's position was. Let me ask you now, Mr. Kove, would the defendant now be ready to testify and answer these questions?

Mr. Kove: At the very present moment his answer to that is, no. I do not foreclose the possibility in the future; I might say, your Honor, I was called in by other counsel,

so I am more or less limited as to all the commitments that I would make in this hearing.

The Court: I realize that. I just want to make certain that we are not going through a futile act here, if the defendant is now ready to answer the questions, even though he refused to answer them in the past, that we might be able to have him now go before the grand jury.

Mr. Kove: I appreciate that, your Honor, I explored that proposition.

The Court: You may proceed with your evidence then.

Mr. Brodsky: I would like to call Miss Magnetic Love.

Mr. Kove: If your Honor please, she is one of the court stenographers. I am ready to concede these facts.

Mr. Brodsky: Your Honor indicated that you wanted us to proceed—

The Court: I presume you have a transcript of the record.

Mr. Brodsky: Yes, we have.

Mr. Kove: I read the transcript.

The Court: Maybe we can admit that the witness if called would testify that she was a grand jury stenographer, that she took these minutes and transcribed them and they are accurate.

Would you be ready to concede that, Mr. Kove? You read the minutes.

Mr. Kove: Yes, I read the transcript. The transcript was furnished to me a little while ago.

The Court: On that basis you can offer those transcripts.

[fol. 27] Mr. Brodsky: Thank you, your Honor.

We now offer those transcripts as the Government's exhibits.

Mr. Kove: I have read a copy of them, your Honor. I am sure it is the original, the copy that I have. No objection.

(Marked Government's Exhibit 1 in evidence.)

Mr. Brodsky: If your Honor please, there are two other reporters who took this testimony, if Mr. Kove will concede that their report is accurate, that the testimony was transcribed, that this is an accurate transcript, then we would offer them in evidence.

The Court: What we come down to is this: does Mr. Kove, the attorney for the defendant, concede that the grand jury stenographers who took these transcripts, if called, would testify that they were grand jury stenographers, they took the testimony, they transcribed it accurately and these transcripts that are now offered in evidence are true and accurate transcripts of the proceedings before the grand jury?

Mr. Kove: That is right, your Honor.

The Court: You will concede that, Mr. Kove?

Mr. Kove: Yes.

The Court: To save calling the witnesses.

Mr. Kove: That was exactly my motive. They are all contained in that exhibit, are they not?

Mr. Brodsky: Yes.

The Court: What is Exhibit 1 now?

Mr. Brodsky: If your Honor please—

The Court: A transcript of what?

Mr. Brodsky: This is a transcript of the testimony of Giacomo Reina in the Southern District of New York before a grand jury on December 5, 9, 10 and 11, 1958, and January 15, 1959.

[fol. 28] The Court: The accuracy is conceded by the defendant, so we will receive this in evidence.

Mr. Kove: If your Honor pleases, just to supplement my previous statement, so as to preserve the record, in addition to testing the constitutionality of the statute per se, I would like to preserve the record in this case with the right to also test the materiality of any questions that might appear that probably will not be material within the context of that statute.

The Court: All right. I understand that. Before we get that far I would like to know what we are looking for as to the evidence. I get your point.

Where is the Attorney General's letter? Is that going to be offered in evidence, too?

Mr. Brodsky: Yes, your Honor.

The Court: I have gone through this. Any further evidence?

Mr. Brodsky: If your Honor please, there are a series of papers which are sealed and at this time I move to have

the seal broken and the papers offered in evidence. Those papers include an application for an order directing Giacome Reina to testify, a notice of that application, letter dated December 8, 1958, from the Attorney General to the United States Attorney for the Southern District of New York, and an order signed by Judge Edelstein dated December 17, 1958, directing Giacomo Reina to testify.

The papers also include a certificate signed by me which includes the facts surrounding the circumstances of this case.

The Court: I direct that the seal be broken and they be offered in evidence. You offer these papers in evidence?

Mr. Brodsky: Yes, your Honor.

The Court: Which is a notice of an application for a [fol. 29] hearing to be held on December 10. The application is signed by Mr. Christy, and a certificate signed by Mr. Brodsky, a copy of a letter signed by Mr. Rogers, the Attorney General, authorizing Mr. Christy to make application to the United States District Court for the Southern District of New York for an order instructing the defendant to testify and to give evidence pursuant to the provisions of Title 18, United States Code, Section 1406; order signed by Judge Edelstein dated December 17, 1958, in which the defendant was directed to appear as a witness before the grand jury on the 12th day of January, 1959, in order to answer the questions propounded to him before the grand jury as heretofore, pursuant to the provisions of the statute, Title 18, United States Code, Section 1406. These will be received in evidence.

Mr. Brodsky: Your Honor, for the record, the witness was ordered to appear before the grand jury on January 12, and that appearance was adjourned to have him appear on January 15, to answer those questions, and he stood mute with respect to those questions.

Mr. Kove: That is conceded, your Honor.

The Court: He was directed to appear first on January 12, under this order. How was that adjourned? Was that adjourned by the grand jury?

Mr. Brodsky: Yes, your Honor.

The Court: Was he served with a copy of this letter of the Attorney General?

Mr. Brodsky: Yes, your Honor.

Mr. Kove: Yes, your Honor, the papers were served.

The Court. Also a copy of this order directing him to testify?

Mr. Kove: By Judge Edelstein's order?

The Court: Yes.

Mr. Kove: Yes.

The Court: Anything further?

Mr. Brodsky: Nothing further.

[fol. 30] There are some very small and minor differences between the questions as they appear in the Government's application and as they appear in the transcript. For the record I would like to point out these small discrepancies, if your Honor please.

On December 5, 1958, the transcript has the following question:

> "Did Vincent Mauro or anyone working with or for him ever receive narcotics from any of the French Nationals mentioned previously above."

The application leaves out the word "above." The transcript says "in July of 1950." The application says, "in July, 1950."

And also on December 5, 1958, the transcript has the word "passport," and the application the words "passports."

Those are the only differences between the transcript and the application.

The Court: Anything further?

Mr. Brodsky: That is all, your Honor. The Government rests.

Motion to Deny Motion to Punish for Contempt

Mr. Kove: On behalf of the defendant in this contempt proceeding, your Honor, I respectfully move you for a denial of the motion to punish for contempt on the ground that this defendant's position as to Title 18, Section 1406 of the United States Code in violation of the Fifth and Fourteenth Amendments of the United States Constitution, in that it does not provide the broad immunity contemplated by the two sections of the Constitution; and on

the further ground that there appear to be several of the questions propounded that are not within the context of the meaning of the statute as enacted.

The Court: Do you wish to argue those points now?

Mr. Kove: I do not think it would be necessary, your Honor because it would take more than just the argument [fol. 31] to point up which—you are talking about the specifics, the questions?

The Court: First of all, a point of law about the question of the constitutionality.

Mr. Kove: The only argument that I can make at this stage, your Honor, is that since Section 1406 provides that upon application to a court, after certification by the Attorney General, the witness may be granted immunity. There is nothing in the section which indicates the breadth of that immunity with respect to possible prosecution in other jurisdictions, specifically other than Federal jurisdictions. I have in mind state jurisdictions.

I am also mindful of the fact that a similar statute with respect to the subversive control legislation that was passed by Congress, that there the Supreme Court has spoken. I submit, though, at this stage that there is a difference; that Congress wrestled with the problem at great length before they enacted this statute.

It is our position at this time that the enactment of this immunity statute is just one of many attempts to chip away the basic liberties guaranteed by the Constitution. I believe that we should have the opportunity of testing this specific statute, independently of any decisions that might have been made with respect to other sections of the Code, the United States Code, to determine how far the Supreme Court is going to countenance the enactment of statutes which, to use the vernacular, would constitute exemptions on the resrictions contained in the Fourteenth and Fifth Amendments to the Constitution.

I submit to you that this section, I do not believe at this point, is that kind of a statute which would be justified under all the circumstances.

The Court: I do not quite see why. What is this constitutional right that you are talking about?

[fol. 32] Mr. Kove: The broad constitutional right of a defendant, your Honor, although I may be in error, this is the way I think, is that if he refuses to answer, which is a basic right, and if he is then given immunity from answering, should be the kind of immunity where no jurisdiction, federal or state, could then come along and prosecute upon any matter relating to or arising out of the answers to the questions contained in the so-called immunity.

The Court: You admit that the statute does give federal immunity.

Mr. Kove: From its language I think it does, sir.

The Court: Your point is that it might not grant him immunity under state laws?

Mr. Kove: That is correct. That is my present view of it. I suppose that it will probably distill itself down to being the question. I think that would be the hard core eventually.

The Court: What is this case involving subversive activities?

Mr. Kove: I do not know what the arguments were, I am frank to admit, your Honor. I have not researched that question at all, for the sake of the record, so that your Honor won't think that I am being dilatory, I just got through trying a two weeks' case which ended last night at about ten o'clock. I haven't had physical time to do very much of anything. But my advice comes to me from other counsel that this is basically what happened in the other situation. I think that they are not parallel, because I think it is the sense of the opinion there that this was a national emergency and that in those types of emergency they might countenance Congress enacting statutes limiting the force and effect of the Fifth Amendment to the Constitution. I respectfully submit that this would probably be our argument, that this Section 1406 does not countenance the type of emergency that Congress had in mind, or should have had in mind.

[fol. 33] In other words, I suppose they could say that it is an undue limitation or undue restriction of the rights guaranteed by the Fifth Amendment to the Constitution.

The Court: What is this right guaranteed under the Fifth Amendment? The right is that no man shall be called upon to testify against himself.

Mr. Kove: That is the basic language of the founding fathers, your Honor, but I think over the years that there has been a lot of case law grow up around that section which would indicate quite clearly that any time a man gives information—withdrawn. If a man is required to give information which might ultimately lead to his prosecution or conviction for a crime that comes within the framework of the Fifth Amendment. I think there is no quarrel about that being its meaning; whether he gives direct evidence against himself or information which might lead to evidence against himself.

The Court: Has this question ever been raised before?

Mr. Kove: With respect to this section?

The Court: The constitutionality of the section?

Mr. Kove: I do not think it has, sir.

Mr. Brodsky: Yes.

Mr. Kove: I stand corrected, if it has. My information was that it had not been.

Mr. Brodsky: If your Honor please, the question was raised on the precise point that Mr. Kove is raising now as to whether or not a person would be granted immunity from state prosecution was raised in the Sixth Circuit.

Mr. Kove: Yes. The Tedesco case?

Mr. Brodsky: Yes.

Mr. Kove: I am sorry that I answered your Honor erroneously, I read that case very hurriedly. The Sixth Circuit case does answer that question. I must say most respectfully that I disagree with that opinion.

The Court: You think they were wrong.

Mr. Kove: I do.

[fol. 34] The Court: Is that the Corona case?

Mr. Kove: No, Tedesco, T-e-d-e-s-c-o, against the United States, 225 Fed. 2nd, 35. It is a Sixth Circuit case decided in 1958.

The Court: Decided when?

Mr. Kove: 1958, last year.

The Court: 225 Fed. 2nd?

Mr. Kove: Yes, sir.

The Court: What was the second point that you raised, about certain questions being irrelevant?

Mr. Kove: On that score, your Honor, I merely wanted to preserve the record, if it should appear that any questions were not relevant I would have the right to include that and go up on that basis.

The Court: I do not think you have the right to include that unless you argue it to me and give me the opportunity to pass on it.

Mr. Kove: Here is what I want to say, your Honor: the questions as I see them in the papers are not irrelevant, but I raised this question before Judge Edelstein at the time that he signed the original order as to whether the defendant should testify. I said then that I thought that we were entitled to know, rather that we were entitled to have it known that we were being confined, the order was being confined, to the questions that were included in the motion papers, asking for the granting of that order. My application was denied. Judge Edelstein's ruling, I believe, was that the defendant should be ordered to answer all questions including those which might not appear in those papers.

I say to you now it does not appear to me from the papers that I have that there are any questions that are actually irrelevant, but since Judge Edelstein's order appeared to be broader than it does on its surface, I wanted that protection should other questions be propounded.

[fol. 35] The Court: All questions that are certified here, they are not irrelevant, and those are the questions which the witness has refused to answer, and he is charged with contempt.

Mr. Kove: I do not see any specifically outside the context of the motion.

The Court: Do you wish to file any brief on these points?

Mr. Kove: I would say yes, your Honor, but I have no way of advising you how much time I need. I am getting some assistance on this. I would need some time. I would appreciate the Court's extreme generosity.

The Court: When we are talking about some time, what are we talking about?

Mr. Kove: Well, if I am going to state a specific time, I would say two weeks.

The Court: I do not see that you need two weeks. There is only one question, which is the constitutional provision. The other point I do not think amounts to much, in view of what you say now. The constitutionality provisions, you could brief that, I think, in twenty-four hours.

Mr. Kove: I could, your Honor, if I had nothing else to do. I have a one-man practice.

The Court: I understand you were up until midnight last night.

Mr. Kove: It was very fatuous.

The Court: If you stay up until midnight tonight, you can finish the brief in this case.

Mr. Kove: If I stay up until midnight tonight and a few more nights, it soon might become academic so far as I am concerned. I would not want to speed that on too fast because I had a narrow escape not too long ago.

The Court: If there is any learning on the subject I will be glad to receive it. As I recall it, there were some things about it in the Law Review.

Mr. Kove: There probably were, but I confess complete [fol. 36] ignorance at this moment as to what it was, where it was or whose law review it was. My application, your Honor, is made in good faith. I have to start from scratch. This is not the type of question that comes up normally, where we can put our fingers on it and know where to start from immediately.

The Court: I cannot put it off for two weeks because the first week in February I start in motion part. That month of February is going to be a cruel and unusual punishment on any judge, in the motion part. This motion is going to be decided within a week by me. I have to decide it before the end of this month, which is next week. If you want to have a few days to file a brief, I will be glad to receive it. Other than that I cannot do it.

Mr. Kove: Today is the 22nd. May I have a week, your Honor?

The Court: No, because I am going to decide it within a week. A week from now will be the 29th.

Mr. Kove: According to your Honor's own suggestion, you do not expect this to be a very long brief, so you won't need as much time to read it as I will need to write it.

The Court: It doesn't have to be very long. One good case is worth a lot of argument.

Mr. Kove: That is true.

The Court: How about letting me have it by Tuesday, anything that you get together. You can work on it Saturday, I will be working Saturday.

Mr. Kove: Judge, I would gladly change positions with you. I will try to do something on it.

The Court: Would the Government wish to file any memorandum on this subject?

Mr. Brodsky: Yes, your Honor, we would.

The Court: All briefs in then by Tuesday.

Mr. Esbitt: May we have a day or two after Mr. Kove files his brief, so we can look it over?

[fol. 37] The Court: All briefs in by Tuesday at four o'clock. Then I will hand down my opinion. All briefs by Tuesday.

You do not wash to offer any evidence, I take it, Mr. Kove, at all?

Mr. Kove: In the present posture of this case, I do not think I can, your Honor.

The Court: You just made a motion now to dismiss on certain grounds. I will now say that I am denying your motion. You can proceed to put in any evidence that you wish.

Mr. Kove: I rest and renew my motion on the same grounds.

The Court: I will decide that after I get the briefs.

Mr. Esbitt: May we be heard with respect to the sentence, your Honor?

The Court: I should think so. Do you want to say anything now? Frankly, my feeling at the present time is that unless there is something to this constitutional point that Mr. Kove makes, obviously the man must be guilty of contempt. I am not deciding any constitutional point until I get the briefs. Other than that the man will be held guilty of contempt. I think even Mr. Kove admits that. If he is to be held in contempt, what does the Government want to suggest?

Mr. Brodsky: If the Court please, the files of the Federal Bureau of Investigation, and Mr. Reina's Federal Peni-

tentiary Prison file shows the following: He was born on September 21, 1909, in New York City.

On January 1st, 1929, when he was nineteen he was arrested following the robbery of a drug store, charged with assault and robbery and committed to the Elmira Reformatory on April 11, 1929.

He was paroled on November 18, 1930, and returned to the home of his mother. During the period of his parole he was arrested twice. On July 2, 1931, he was appre- [fol. 38] hended following an alleged robbery. He was acquitted and reinstated on parole.

On July 1, 1931, he admittedly struck a man who fell to the sidewalk suffering from a fractured skull which necessitated ten days' hospitalization. The complaint was withdrawn by the victim.

On October 4, 1933, he was returned to custody as a parole violator and was reparoled on March 27, 1934.

On June 29, 1934, he was taken to the City Prison pending an investigation and as he left the courtroom in the custody of the parole officer, he and an accomplice who was waiting for him, attacked the officer and escaped in a waiting automobile. He was a fugitive for about eight and one-half years, during which time a search was conducted for him.

On December 16, 1942, he was arrested by an agent of the Federal Bureau of Narcotics and returned to prison as a parole violator. He was discharged from the Auburn Prison at the expiration of his sentence on December 28, 1947.

On March 21, 1956, he was convicted along with four other persons for violating the Federal Narcotic laws. He was fined $10,000 and received a sentence of five years, which he is presently serving.

Your Honor, the Government believes that Mr. Reina's contempt of this court, along with his long history of defiance of law and order deserves a long jail sentence, to commence upon the expiration of his present period of incarceration, which will be approximately two years from now, or a minimum of approximately one year from now.

We cite to the Court's attention the case of United States versus Green, which was affirmed by the Supreme Court this year in which your Honor sentenced two contemnors

to three years in jail, those sentences to commence after the expiration of the five-year sentence imposed for violation of the Smith Act.

[fol. 39] We would also like to cite for the Court's attention the case of United States versus Tompkins, which was affirmed by the Court of Appeals for this circuit, in which Judge Noonan imposed a four-year sentence for contempt of court.

The Government feels that the contumacious conduct of this witness calls for a substantial jail sentence, not only as punishment to this witness but as a deterrent to the entire criminal world that the Government will not tolerate and will not permit underworld lockjaw for the underworld code of silence and secrecy to frustrate the lawful and proper activities of this or any other grand jury in the United States. We feel most strongly that this court should impose a substantial jail sentence on this witness as a warning to him and others who may be disposed to remain silent.

I make these comments with full realization that the Fifth Amendment to the Constitution of the United States is a privilege which is properly and lawfully offered to every individual who may appear before a grand jury. But I also say to your Honor that when that privilege has been withdrawn by lawful order of this court and when that privilege no longer exists, as it no longer does in this case, that the silence by this witness is an affront not only to the grand jury but to the judges of the Federal court. The Government of the United States cannot and will not permit its lawful and investigative, prosecutive officers to be frustrated and rendered ineffective by such silence.

For these reasons we urge the Court, within your Honor's discretion, as provided by 18 U.S.C. 401, to impose a substantial jail sentence against this witness.

Thank you, your Honor.

The Court: Do you wish to comment on that at all, Mr. Kove? You do not have to, if you do not want to.

Mr. Kove: It is a very beautiful speech, but I do not think it has anything to do with punishment for contempt, [fol. 40] if contempt there be under the law. I am interested now in finding something to sustain the legal question rather than this record. I only want to say one thing in

passing. I have been a prosecutor myself, and perhaps I have fallen in that pattern occasionally. But I hope now in this well gotten up history of the defendant's record, they involve records which do not constitute convictions for crime. I would ask your Honor that that amount of discretion be applied to this case, because there is no way of disproving the guilt of a man who is claimed to be guilty for something which resulted in no criminal act and prosecution. That is all I have to say. I have my own reasons as to why the record was revealed in open court at this time. I do not think it has anything to do with passing sentence on a man because I think what we should be bound by in the true administration of justice and are those things which would constitute conviction for crimes having been committed and these are things that could happen to many, any people who are not guilty of any crime. I simply want to point that out to your Honor in passing.

The Court: If there is nothing more, the case will be adjourned. If here is anything further, put it in Tuesday with your brief.

[fol. 41]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION OF DAWSON, J., DATED JANUARY 29, 1959
FINDING DEFENDANT IN CONTEMPT, ETC.

Dawson, D. J.:

This is a proceeding brought on by an order to show cause to adjudge the respondent to be in contempt of court. See Title 18, U. S. C., §401. It is alleged that the respondent is in contempt for refusing to answer certain questions put to him when he appeared as a witness before the Grand Jury.

A hearing was held and testimony taken. The Court, after having heard the evidence offered on the part of the United States of America, no evidence having been offered [fol. 42] on behalf of the respondent, makes the following findings of fact:

1. On December 5, 1958, Giacomo Reina duly appeared before a Grand Jury in the Southern District of New York, pursuant to a writ of habeas corpus ad testificandum duly served upon him.

2. Said Grand Jury was duly constituted in the Southern District of New York to investigate, among other things, matters relating to alleged violations of the Federal Narcotic Laws.

3. Giacomo Reina was asked a series of questions relevant and pertinent to matters then pending before the Grand Jury and Giacomo Reina refused to answer those questions on the ground that his answers might tend to incriminate him.

4. By letter dated December 8, 1958 the Attorney General of the United States authorized the United States Attorney for the Southern District of New York to apply for an order directing Giacomo Reina to testify pursuant to the provisions of 18 U. S. C. §1406.

5. On December 17, 1958, pursuant to the provisions of 18 U. S. C. §1406, the Honorable David N. Edelstein directed Giacomo Reina to return to the Grand Jury on January 12, 1959 and ordered that "subject to the provisions of Title 18, United States Code, Section 1406, as amended, that Giacomo Reina be, and he hereby is, instructed to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury. . . ."

[fol. 43] 6. On January 12, 1959, Giacomo Reina appeared before the said Grand Jury and was directed to return on January 15, 1959.

7. On January 15, 1959 Giacomo Reina returned to the Grand Jury and was asked the same questions as had been asked on December 5, 1958. He refused to answer and stood mute with respect to each question.

8. On January 15, 1959, this Court ordered Giacomo Reina to show cause why he should not be adjudged and held in contempt of court.

Title 18, U. S. C., §1406 (Narcotic Control Act of 1956) provides in effect that whenever in the judgment of a

United States Attorney the testimony of a witness in any case or proceeding before any Grand Jury for the violation of certain of the Narcotic Laws is necessary in the public interest, he, upon approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify, and upon order of the court the witness shall not be excused from testifying on the ground that the testimony required of him may tend to incriminate him or subject him to a penalty or forfeiture. It further provides that

> ". . . no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prose- [fol. 44] cution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

At the hearing in this proceeding, respondent admitted through his counsel that he had refused to answer the questions propounded to him, offering as his only excuse for his refusal, fear of self-incrimination. He admitted that the order of Judge Edelstein had been issued after receipt of the letter from the Attorney General, and that this order had the effect of granting him the immunity provided in the statute. The respondent offered no evidence on his behalf, but simply took the position that the statute under which Judge Edelstein had issued his order was unconstitutional as violative of the provisions of the Fifth Amendment of the United States Constitution.* Respondent maintains that even though the Narcotic Control Act of 1956 grants immunity to a witness from prosecution in relation to matters as to which he testifies, when compelled

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* "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. Const., amend. V.

to testify under such Act, the Act does not grant immunity from state prosecution and therefore does not extend protection as broad as that granted under the self-incrimination clause of the Fifth Amendment.

The basic issue which this Court must therefore decide is whether the immunity provisions of the Narcotic Control Act of 1956 are constitutional and whether the respondent may be punished for contempt for failing to comply with an order issued under the provisions of this Act.

The law apparently is well settled that a federal immunity statute is valid even though it does not grant immunity from prosecution by state authorities. *United* [fol. 45] *States* v. *Murdock*, 284 U. S. 141 (1931); *Tedesco* v. *United States*, 255 F. 2d 35 (6th Cir. 1958).

In *United States* v. *Murdock*, 284 U. S. 141 (1931) an action for wilfully failing to supply information under the Revenue Acts, the Supreme Court denied the contention that a federal immunity statute must give protection against state prosecutions, stating:

> ". . . This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547. *Brown* v. *Walker*, 161 U. S. 591, 606. *Jack* v. *Kansas*, 199 U. S. 372, 381. *Hale* v. *Henkel*, 201 U. S. 43, 68. . . . "

Therefore, it is clear that the federal courts need not concern themselves with whether or not the testimony would be incriminating under the laws of another jurisdiction. The federal courts need only be certain that the immunity statutes extend protection in the federal sphere as extensive as the Fifth Amendment. The privilege of this amendment may be invoked against the federal government only when

there is danger of federal prosecution and it is well established that a grant of immunity from federal prosecution is sufficient to overcome the privilege, notwithstanding a [fol. 46] real danger of state prosecution. *United States* v. *Murdock*, 284 U. S. 141 (1931).

This concept, as expressed by the *Murdock* decision, is the controlling doctrine in this area today. See, *Tedesco* v. *United States*, 255 F. 2d 35 (6th Cir. 1958); *United States* v. *Coffey*, 198 F. 2d 438, 440 (3d Cir. 1952). *Marcello* v. *United States*, 196 F. 2d 437, 442 (5th Cir. 1952) (where the court stated: The doctrine [of the Murdock case] is so strongly entrenched that it appears . . . futile to protest. . . . "); *United States* v. *Greenberg*, 192 F. 2d 201, 203 (3d Cir. 1951); *United States* v. *St. Pierre*, 128 F. 2d 979, 980 (2d Cir. 1942).

The decisions in both the state and federal courts which hold that the immunity statutes of either the state or federal government need be only as extensive as either the state or federal constitutional privilege against self-incrimination are apparently based on the "two sovereignties" concept. This concept, simply stated, is that the federal government and the individual states are separate sovereignties and constitutional provisions against self-incrimination are enforceable only against the sovereignty whose constitution guarantees the privilege. *Knapp* v. *Schweitzer*, 357 U. S. 371, 380 (1958). Such provisions, therefore, pertain only to the protection of a witness from prosecution by the government whose conduct they limit. 8 Wigmore, *Evidence*, 3d ed. § 2258 (1940).

With the above background the result in this proceeding is apparent. It is clear that testimony of a witness may be compelled under a federal immunity statute which provides immunity co-extensive with the Fifth Amendment privilege against self-incrimination; and that a grant of state immunity is not necessary to validity. *Tedesco* v. *United States*, 255 F. 2d 35 (6th Cir. 1958).

[fol. 47] The Court concludes as a matter of law that the immunity granted by the Narcotic Control Act of 1956 is not unconstitutional; that it is not unconstitutional to compel the witness to testify before the Grand Jury on the matters concerning which he was interrogated, in view of

the immunity granted him by the Narcotic Control Act of 1956; and that refusal of the witness to comply with an order of the court directing him to answer the questions addressed to him constitutes a contempt of court.

The Court finds the respondent to be in contempt of court and directs that he be punished by imprisonment for two years, to commence at the expiration of the sentence which he is now serving. The Court recognizes that the refusal of the witness to answer the questions when first addressed to him may have been a procedural device to secure a determination of the issue of law which he presented. Under those circumstances the Court directs that the witness shall have sixty (60) days from the date of this judgment to purge himself of his contempt by answering the questions which have been addressed to him by the Grand Jury and directs that if he does purge himself of contempt within this period the sentence imposed herein will be vacated. So ordered.

Dated. New York, N. Y. January 29, 1959.

Archie O. Dawson, U.S.D.J.

[fol. 48]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF ORAL MOTION TO SET ASIDE FINDINGS AND SENTENCE

Before: Hon. Archie O. Dawson, D. J.

New York, February 2, 1959, R. 506.

For the Government: Edward Brodsky, Esq.

For the Defendant: Moses L. Kove, Esq.

(Mr. Brodsky stated the Government had made its statement with respect to sentence at the time of the hearing, and had nothing further to add.)

(Mr. Kove stated he had nothing further to add, except he had one question after the sentence.)

The Court: The Court has handed down its opinion in this matter, dealing with these problems of law that Mr. Kove brought up on the hearing, when I indicated the sentence that would be imposed.

Mr. Reina, you have been asked certain questions before the grand jury. Are you now prepared to answer those questions?

The Defendant: I cannot, your Honor.

The Court: You will not answer the questions even now. Well, in accordance with the opinion I have handed down I would impose that sentence. Is there anything you want to say before sentence is imposed?

The Defendant: No.

The Court: Anything you want to say, Mr. Kove?

Mr. Kove: I think I have stated my position the last time.

The Court: The sentence of the Court is that the defendant shall be imprisoned for two years for contempt of court, the two years to start upon completion of the sentence which he is now serving. Defendant shall have the right within sixty days to answer the questions which were [fol. 49] propounded in the grand jury and purge himself of the contempt. If he does do that, then this sentence will be revoked; if he does not, it will stand.

(Mr. Kove stated in the light of the latter part of the Court's remarks, he asked a direction defendant be kept in West Street as a convenient place to confer with defendant if the matter is taken up and to formulate such papers as would have to be drawn.)

(The Court stated that it was not for the Court to decide, but if defendant intended to answer the questions then he should notify Mr. Kove and Mr. Kove notify the Court, and it will be brought before the grand jury no matter where defendant happened to be, and the sentence could be revoked at that time.)

The Court: He has sixty days to perform his duty as a citizen and purge himself of the contempt. If he does not, the sentence will stand. As you have probably told him, Mr. Kove, he will again be asked the questions, and he may

be spending the rest of his life in jail. I do not like to think about a prospect like that, and I do not think he likes that either; but it is up to him to answer the questions or not. I am not going to recommend where they will keep him.

MOTION TO SET ASIDE FINDINGS AND SENTENCE AND DENIAL THEREOF

Mr. Kove: May I now for the record, your Honor, move to set aside the findings of the Court and the sentence upon such findings, upon all the grounds previously stated in the original defense at the trial.

The Court: You may, and I deny it.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Joseph A. Friel, Official Court Reporter, U. S. District Court.

[fol. 50]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUDGMENT AND COMMITMENT—February 2, 1959

On this 2nd day of February, 1959 came the attorney for the government and the defendant appeared in person and by counsel, after a hearing held on January 22, 1959 pursuant to an order to show cause filed January 15, 1959 why defendant should not be adjudged in contempt of court for refusing to obey the order of Judge Edelstein dated 12-17-58 directing said defendant to appear before a grand jury and answer questions.

It Is Adjudged that the defendant has been convicted of contempt of Court for refusal to obey the aforesaid order of this court as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years, to commence at the expiration of sentence he is now serving.

Defendant shall have sixty (60) days from the date of this judgment to purge himself of his contempt, in which event the sentence imposed herein shall be vacated.

[fol. 51] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Archie O. Dawson, United States District Judge.
Herbert A. Charlson, Clerk.

[fol. 52]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL—February 6, 1959

Name and address of appellant:

Giacomo Reina, Federal House of Detention West Stree., New York, New York

Name and address of appellant's attorney:

Allen S. Stim, Esq., 29 Broadway New York 6, New York

Offense:

Contempt of court for refusing to obey the order of Judge Edelstein dated 12-17-58 directing said defendant Giacomo Reina to appear before a grand jury and answer questions.

Concise statement of judgment or order, giving date, and any sentence: by judgment dated the 2nd day of February, 1959 the defendant Giacomo Reina is committed

to the Attorney General or his authorized representati[illegible] for imprisonment for a period of two (2) years, to commence at the expiration of sentence he is now serving. Defendant shall have sixty (60) days from the date of this judgment to purge himself of his contempt, in which event the sentence imposed herein shall be vacated.

Name of institution where now confined, if not on bail: Federal House of Detention, West Street, New York, New York.

[fol. 53] I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

Dated: February 6, 1959

Giacomo Reina, Appellant.

[fol. 54]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 169—October Term, 1959.

Argued December 9, 1959

Docket No. 25644

UNITED STATES OF AMERICA, Appellee,

—v.—

GIACOMO REINA, Appellant.

Before: Swan and Friendly, Circuit Judges, and Herlands, District Judge.

OPINION PER CURIAM—Decided December 30, 1959

Appeal from a judgment of the United States District Court for the Southern District of New York, Dawson, J., adjudging appellant guilty of criminal contempt of court for refusing to obey an order directing him to answer certain questions before a federal grand jury. Affirmed.

Allen S. Stim, Attorney for Appellant. Menahem Stim, of Counsel.

S. Hazard Gillespie, Jr., United States Attorney, for Appellee. Joseph DeFranco, Daniel P. Hollman, George I. Gordon, Assistant United States Attorneys, of Counsel.

[fol. 55] Per Curiam:

Pursuant to 18 U. S. C. A. §401(3) appellant was convicted of criminal contempt of court and was sentenced to two years imprisonment for refusing to answer certain questions before a federal grand jury inquiring into alleged violations of the narcotics laws, after he had been granted immunity under 18 U. S. C. A. §1406 and had been ordered by the court to answer the questions. Judge Dawson's well reasoned opinion is reported in 170 F. Supp. 592.

Appellant attacks the constitutionality of §1406. His principal argument is that the immunity granted under this statute will not protect him from state prosecutions. That a federal immunity statute need not do so was settled long ago in *United States* v. *Murdock*, 284 U. S. 141.[1] He says that the courts should re-examine the *Murdock* decision. But, obviously, such re-examination is not for this court to make.

At the time of his appearance before the grand jury appellant was serving a prison sentence for conspiracy to violate the narcotic laws.[2] The grand jury sought to question him concerning this crime. Seizing upon certain expressions in *Brown* v. *Walker*, 161 U. S. 591, which sustained the constitutionality of a federal immunity statute similar to §1406, appellant makes the fantastic contention that §1406 is unconstitutional as applied to him because it does not grant a "general amnesty" or "pardon" for his past offense. The error in this argument is that it attempts to convert a general discussion in the *Brown* v. *Walker* opinion, page 601, as to the power of Congress to pass acts [fol. 56] of general amnesty into an independent principle

[1] See also *Knapp* v. *Schweitzer*, 357 U. S. 371, 380; *Tedesco* v. *United States*, 6 Cir., 255 F. 2d 35; *Corona* v. *United States*, 6 Cir., 250 F. 2d 578, cert. den. 356 U. S. 954.

[2] His conviction was affirmed in *United States* v. *Reina*, 2 Cir., 242 F. 2d 302, cert. den. 354 U. S. 913.

of law, requiring appellant's past offense to be pardoned. No authority is cited to support this extraordinary contention.[3]

Additional points made by appellant have been considered but are so plainly without merit that they require no discussion.

Judgment affirmed.

[fol. 57]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

GIACOMO REINA, Defendant-Appellant.

JUDGMENT—December 30, 1959

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 58] [File endorsement omitted]

[fol. 74] Clerk's Certificate to foregoing transcript (omitted in printing).

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[3] For decisions rejecting the contention, see *People ex rel. Hunt* v. *Lane*, 116 N. Y. S. 990, aff'd 196 N. Y. 520; *People* v. *Fine*, 19 N. Y. S. 2d 275; *People ex rel. Gross* v. *Sheriff*, 101 N. Y. S. 2d 271, aff'd 302 N. Y. 173.

[fol. 75]

SUPREME COURT OF THE UNITED STATES

No. 664, October Term, 1959

GIACOMO REINA, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—April 4, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. ~~664~~ 29

GIACOMO REINA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLEN S. STIM,
Member of the Bar of the Supreme Court of the United States,
Attorney for Petitioner,
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Of Counsel:

MENAHEM STIM,
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IN THE

Supreme Court of the United States

October Term, 1959

No. .....

GIACOMO REINA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Giacomo Reina, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 30th day of December, 1959 affirming a judgment of conviction of the petitioner in the United States District Court for the Southern District of New York, dated February 2, 1959 which adjudged him in contempt of court for refusing to testify before a grand jury pursuant to Title 18, United States Code, Section 1406 and sentenced petitioner to a term of 2 years imprisonment with a 60 day purge

clause, said sentence to commence at the termination of a sentence petitioner was then serving (R. 47, 50a).*

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit affirming the aforesaid judgment adjudging the petitioner to be in contempt of court and which was entered in the United States District Court for the Southern District of New York is not yet officially reported, ... F. 2d ...., United States Court of Appeals, Second Circuit Opinions, October Term, 1959, #169, Page 425. A copy of this opinion is annexed to this petition as Exhibit 1.

At the time that the District Court adjudged the petitioner to be in contempt of court it rendered an opinion which is cited as *In re Reina*, 170 Fed. Supp. 592.

Jurisdiction

The jurisdiction of the United States District Court for the Southern District of New York, was invoked in view of the fact that the contempt charged was based upon alleged disobedience by petitioner to an order of said Court, to wit: his refusal to testify before a grand jury subject to the provisions of Title 18, United States Code, Section 1406, as ordered by said Court in its order dated December 17, 1958 (R. 16, 16a). Said contempt proceeding was pursuant

* Numerals preceded by letter "R." refer to page number of Record on Appeal to the Court of Appeals. Numerals followed by letter "a" refer to page number of Appendix to petitioner's brief in the Court of Appeals.

to Title 18, United States Code, Section 401 (3). No petition for a rehearing of the appeal herein was made.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U.S.C., Section 1254 (1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is sought on the grounds that the United States Court of Appeals for the Second Circuit has decided an important question of Federal law which should be clarified and made more definite and certain by this Court; has decided a Federal question of substance not theretofore determined by this Court; and that the subject matter of this petition concerns constitutional questions concerning which this Court in the light of events, and applications of an earlier decision of this Court (*United States* v. *Murdock*, 284 U. S. 141) in Federal criminal investigations and litigations, strongly suggests the advisability of a reexamination by this Court of the position formerly taken by it in the *Murdock* case.

Questions Presented for Review

1. (A) Do the immunity provisions of Title 18, Section 1406, United States Code, grant immunity from state prosecutions?

1. (B) If the immunity provisions of Title 18, Section 1406 of the United States Code do not grant immunity from State prosecutions, is said immunity coextensive with the privilege against self-incrimination under the Fifth Amend-

ment of the Constitution of the United States? And in deciding this question, should not the Supreme Court of the United States re-examine the position it took in *United States* v. *Murdock*, 284 U. S. 141?

2. Was not petitioner denied due process of law by the failure of the District Court to inform him as to the extent of the immunity granted pursuant to Title 18, United States Code, Section 1406, and whether said immunity extended to State prosecutions, before adjudging petitioner to be in contempt of Court?

3. On the facts of the present proceeding, was it not incumbent upon the Government to have made the petitioner an unconditional offer to excuse or remit any unserved portion of the earlier Federal conspiracy sentence that he was then serving and any unpaid fine or forfeiture imposed therein upon the petitioner which penalties were based upon the same matter that he was questioned about by the Grand Jury in this proceeding under the purported grant of immunity pursuant to Title 18, Section 1406, before petitioner could be held in contempt of court?

4. Upon the facts herein was not the sentence of the petitioner to two years imprisonment for contempt of court, excessive and an abuse of discretion?

Statutory Provisions in Point

Title 18, United States Code, Sec. 401:

"Sec. 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion,

such contempt of its authority, and none other, as * * *.

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

Title 18, United States Code, Sec. 1406:

"*Immunity of Witnesses*

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., Sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any trans-

action, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, C. 629, Title II, § 201, 70 Stat. 574."

Concise Statement of the Case

The contempt proceedings which resulted in the judgment of conviction herein were brought pursuant to Title 18 of the United States Code, Section 401(3), and arose out of the petitioner's refusal to testify before a Grand Jury and his invoking his privilege against self-incrimination on being asked questions before said Grand Jury (R4-11, 5a-11a, R55, 24a, R56, 25a) after the United States District Court for the Southern District of New York (Edelstein, *J.*) by order dated December 17, 1958, directed him to so testify and which order purported to grant the petitioner immunity from prosecution pursuant to Title 18 of the United States Code, Section 1406, as amended (R16-18, 16a-18a).

At the hearing on the contempt proceeding held on the 22nd day of January, 1959, before Hon. Archie O. Dawson, United States District Judge, for the Southern District of New York (R54 et seq., 23a et seq.) the petitioner opposed the Government's motion to punish him for contempt on the grounds that Title 18, Sec. 1406 of the United States Code is in violation of the Fifth and Fourteenth Amend-

ments of the United States Constitution in that it does not provide the broad immunity contemplated by said amendments of the Constitution and that several of the questions propounded to the petitioner before the Grand Jury were not within the context of the meaning of the said Statute as enacted (R12-13, 30a).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

POINT I

This Court should re-examine the position that it took in *U. S.* v. *Murdock*, 284 U. S. 141, wherein it held that the validity of a federal immunity statute did not require that the immunity apply to state prosecutions.

The privilege against self-incrimination has come down to us from the English common law and is engraved as a protection against tyranny by the provisions of the Fifth Amendment of the Constitution of the United States. Many attempts to chip away at this privilege have been uniformly condemned by our Courts.

In *Councilman* v. *Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, 12 S. Ct. 195, the Supreme Court clearly enunciated the rule that Congress cannot abridge a constitutional privilege and that it cannot replace or supplant it unless the immunity provision is so broad as to have the same extent in scope and effect as the privilege had. This Court went on to state at page 585, as follows:

> "* * * We are clearly of opinion that no statute which leaves the party or witness subject to prosecution

> after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. • • • "

Since the decision in *Councilman* v. *Hitchcock,* said decision and its meaning have become as controversial as the extent of the constitutional privilege that it sought to define. A number of cases such as *Smith* v. *United States,* 58 Fed. 2nd 735 (CCA 5th, 1932; cert. denied 287 U. S. 631, 77 L. Ed. 547, 53 S. Ct. 82), have held, citing *Councilman* v. *Hitchcock,* as authority, that the statutory immunity granted, to be co-extensive with the privilege under the Fifth Amendment, must afford protection from prosecution in the State as well as Federal courts. (See also *Brown* v. *Walker,* 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644.)

As late as June 1958, Mr. Justice Black, together with Mr. Justice Douglas in their dissent in *Knapp* v. *Schweitzer,* 357 U. S. 371, 2 L. Ed. 2nd 1393, 78 S. Ct. 1302, correctly stated the problem faced by this petitioner when they, in their dissenting opinion at page 385, stated as follows:

> " • • • Indeed things have now reached the point, as the result of United States v. Murdock, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63, 82 ALR 1376, Feldman, and the present case, where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each. Cf. Irvine v. California, 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381; United States v. Kahriger, 345 U. S. 22, 97 L. ed. 754, 73 S. Ct. 510. I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government."

Certainly it is time that this Court re-examine the decision in *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63, the case relied on below in holding that the petitioner herein was guilty of contempt in view of the fact that in the opinion of the Courts below this petitioner was granted immunity coextensive with his constitutional privilege where the immunity covered Federal prosecution but probably did not affect possible future State prosecution.

It is also of interest to note that the highest Courts of the State of Michigan held that an immunity statute that does no grant immunity from both federal and state prosecution is unconstitutional under the Constitution of the United States and under the Constitution of the State of Michigan, which contains a provision similar to the Fifth Amendment of the Federal Constitution.[1] The rationale of the Michigan decisions are set forth in the case *In re Watson*, 293 Mich. Reports 263, 291, N.W. 652, wherein the Court stated as follows at page 284:

> " * * * We believe that this ancient privilege should be maintained against limitations that we conceive tend to make it ineffectual, futile, and subversive of the spirit and letter of the Bill of Rights. Under our Federal system of government, with coextensive jurisdiction of State and national government, a person subject to the laws of a state is, at the same time, subject to the laws of the Federal government. A

[1] Constitution of the State of Michigan of 1908
Article 3, Declaration of Rights
* * * Self-Incrimination; Due process of Law. Sec. 16. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

citizen of a State is a citizen of the United States (Fourteenth Amendment to the United States Constitution). After a review of the authorities and a consideration of the constitutional provisions and the principles involved, we are of the opinion that the privilege against self-incrimination exonerates from disclosure whenever there is a probability of prosecution in State or Federal jurisdiction." (285)

* * * * *

"To overcome the privilege, the extent of the immunity would have to be of such a nature that it would protect, not only against State prosecution, but also against any reasonable probable Federal prosecution. The claim of the privilege in the face of a State immunity statute cannot be used as a subterfuge or pretense to refuse to answer in proceedings to detect or suppress crime. But neither can the grant of immunity be used to compel answers that will lead straight to Federal prosecution. Whenever the danger of prosecution for a Federal offense is substantial and imminent as a result of disclosures to be made under a grant of immunity by the State, such immunity is insufficient to overcome the privilege against self-incrimination. * * *"

See also *In re Schnitzler*, 295 Mich. 736, 295 N.W. 478; *In re Ward*, 295 Mich. 742, 295 N.W. 483.

There is a similar decision in the State of Illinois. See *People* v. *Burkert*, 7 Ill. 2nd 506, 131 N.E. 2d 495.[2]

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[2] Illinois Immunity Statute; Illinois Revised Statute 1953, Chapter 38, Paragraph 580A, stated that the Court shall deny the Attorney General's motion to compel a witness to testify under a grant of immunity "if it shall reasonably appear to the court that such testimony or evidence, documentary or otherwise would subject such witness to an indictment, information or prosecution * * * under the laws of another State or of the United States; * * *"

There has been no clear test of the constitutionality of the Narcotics Control Act of 1956 up to the present time. The case of *Ullmann* v. *United States*, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497, is distinguishable from the present case in view of the fact that it dealt with the immunity provision of the Subversive Control Act, Title 18, U.S.C. §3486, the subject matter of which was exclusively within the jurisdiction of Congress to the exclusion of the States.

The sole case dealing with the Narcotics Control Act is *Tedesco* v. *United States*, 255 Fed. 2nd 35 (U.S.C.A. 6th), wherein the Sixth Circuit, although it held the immunity section of the Narcotics Control Act constitutional under the rationale of the *Murdock* case, expressed grave doubts as to whether witnesses compelled to testify under such act obtain immunity from prosecution in State courts despite the language of the act, purporting to grant immunity "in any Court." In the *Tedesco* case, the Circuit Court was of the opinion that Federal jurisdiction in the question of narcotics does not oust the States from exercising their jurisdiction as both State and Federal authorities have historically exercised concurrent jurisdiction in narcotics matters and therefore Congress was powerless to grant immunity from State prosecution. For that reason it is quite obvious that the Congress in enacting Title 18, United States Code, Sec. 1406 exceeded its power in purporting to grant immunity "in any Court."

It is respectfully submitted that the immunity provisions of the Narcotics Control Act of 1956 do not in fact grant protection co-extensive with the constitutional privilege granted under the Fifth Amendment of the Constitution of the United States in that the witness is not given protection from prosecution in the State jurisdictions.

Any construction by the Courts to the contrary, in effect would nullify the privilege against self-incrimination as granted in the Federal Constitution and petitioner respectfully submits that this Court should re-examine its position formerly taken in *United States* v. *Murdock* (*supra*) to remedy the adverse effects of that case upon Constitutional rights guaranteed in the Federal Constitution.

POINT II.

That the petitioner was denied due process of law by the failure of the lower court to inform him as to the extent of the purported immunity granted pursuant to Title 18, United States Code, Section 1406.

The Court is referred to the *Tedesco* case heretofore cited on page 11 of this brief and the opinion of Judge Dawson in the present case heretofore cited on page 2 of this brief, wherein the lower Court specifically refused to pass upon the extent of the immunity granted under Title 18, United States Code, Section 1406, as to whether said immunity applied to State prosecutions, citing the *Murdock* case as authority for its refusal to pass on said question.

Certainly the petitioner had a right to be fully advised of his rights by the Court before his refusal to testify pursuant to order of said Court, could be used as a basis for holding him in contempt as was done in the present proceeding.

POINT III

The petitioner was not guilty of contempt of Court as the immunity purported to have been offered to him by the government did not amount to a general amnesty or a general pardon for all past offenses, and therefore did not constitute the immunity contemplated by Title 18, United States Code, Sec. 1406.

The record herein discloses that the petitioner at the time that he was brought before the Grand Jury, was serving a five year sentence for violation of the Federal Narcotics Law, the charge being conspiracy, he having been convicted of the said crime on the 21st day of March, 1956 (R. 4, 5a, R. 55, 24a). A reading of the various questions propounded to the appellant before the Grand Jury, both before and after the order purporting to grant immunity, was made (R. 4-11, 5a-11a, R. 21, 21a, R. 60, 27a), shows that most of these questions dealt with matters relating to the crime that the petitioner was previously convicted of and for which he was then serving a prison sentence. While that conviction related to the crime of conspiracy to violate the Federal Narcotics Laws, there was a very strong probability that the petitioner at the time he was ordered to testify before the Grand Jury, might face possible criminal charges for other Federal crimes, such as substantive violations of the Federal Narcotics Laws, violation of the Federal Internal Revenue Laws and of the Narcotics Laws of the State of New York,[3] bringing this case out of the scope

[3] The statute of limitations on Federal offenses is set forth in Title 18, Section 3282 and is a five year period.

Applicable Statute of Limitation for violation of the State laws is set forth in Section 142 of the Code of Criminal Procedure of the State of New York and fixes a five year period as the statute of limitations.

of *Brown* v. *Walker*, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644 which dealt with a fear of imaginary and unsubstantial character.

The history underlying the attempts to emasculate the constitutional safeguards against self-incrimination by trying to compel witnesses to testify to criminal acts through the forced offer upon them of immunity, shows that our Courts invariably insisted that the immunity provided by the so-called immunity statutes be co-extensive with the broad immunity contained in the provisions of the Fifth and Fourteenth Amendments of the Federal Constitution.

The Supreme Court of the United States held that even though the Constitution vests in the President the power to grant reprieves and pardons for offenses against the United States, a person offered such pardon as a condition that he testify need not accept it and if he rejects such offer, cannot be compelled to testify in violation of his constitutional rights (see *Burdick* v. *United States*, 236 U. S. 79, 59 L. Ed. 476, 35 S. Ct. 267). In the *Burdick* case it was held that a pardon issued by President Wilson to one Burdick, which sought to pardon him for any offense committed by him that Burdick be compelled to testify to before a Grand Jury, did not remove Burdick's privilege against self-incrimination when Burdick refused to accept the President's pardon.

Likewise in *Isaacs* v. *United States*, 256 Fed. 2nd 654 (U. S. C. A. 8th, 1958), which involved an appeal from a judgment finding the defendant guilty of contempt, a case not involving an immunity statute, it was held that in a situation where a witness invoked the Fifth Amendment before a Grand Jury, the Court did not have the authority to grant immunity from prosecution to the witness and thus compel him to testify before the Grand Jury.

While Congress has the power to pass statutes granting immunity to witnesses in certain circumstances, that power cannot be lightly used and the immunity granted must be co-extensive with that provided for by the Federal Constitution.

In *Brown* v. *Walker, supra,* involving the immunity provision in the Interstate Commerce Act, which provision granted absolute immunity against Federal or State prosecution, the Court stated at page 601, as follows:

> "* * * The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Taylor on Evidence, Sec. 1455, where a large number of similar acts are collated,) or in this country. Although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' *this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction,* although as was said by this Court in Ex parte Garland, 4 Wall 333, 380, 'it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.' * * *

The Court further stated at page 602:

> "* * * Amnesty is defined by the lexicographers to be *an act of the sovereign power granting oblivion, or a general pardon for a past offense,* and is rarely, if ever, exercised in favor of single individuals, and

> is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted. * * *" (Italics ours)

It is quite obvious that in *Brown* v. *Walker, supra,* the Court upheld the immunity provision in the Interstate Commerce Act on the basis of the power of Congress to grant general amnesty for past offenses.

It is clear from the aforementioned cases that the Courts have consistently held that the privilege against self-incrimination cannot be removed by the President without the consent of the witness (see *Burdick* v. *United States, supra*) nor by the Court (see *Isaacs* v. *United States, supra*), and that the only justification for the passing of immunity statutes is based upon the right of general amnesty that is inherent in Congress to grant.

The Government, having selected the petitioner as a witness to testify although he was already convicted and imprisoned for a past offense, which was the crime dealt with in the questions propounded to the petitioner before the Grand Jury, it was incumbent upon the Government to grant the petitioner a full amnesty to cover the unexpired portion of his sentence he was then serving, as required by the language of the statute which in referring to the immunity purported to be granted reads as follows:

> "But no such witness shall be prosecuted *or subjected to any penalty* for or on account *of any* transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence." (Italics ours)

The petitioner was not offered such amnesty. He was merely offered immunity against prosecution for other Federal offenses that may come to surface as a result of his testimony. The petitioner was therefore not offered the immunity contemplated by the statute and cases and was not granted what, in the language of the Supreme Court in *Brown* v. *Walker, supra,* is referred to as "an act of general amnesty * * *, or an act of the sovereign power granting oblivion or a general pardon for a past offense", if he testified. He was therefore not guilty of contempt of court in refusing to obey an order directing him to answer certain questions before the Grand Jury as no valid offer of immunity was made to him as contemplated by Title 18, United States Code, Section 1406.

POINT IV

The sentence of the petitioner to two years imprisonment for contempt of Court was excessive.

The record discloses that the petitioner at the time that he was questioned before the Grand Jury was serving a jail sentence of five years imprisonment and a fine of $10,000.00 for a crime based upon the facts that he was questioned about before the Grand Jury (R. 4, 5a, R. 2, 24a). Certainly the sentence of the Court below and the judgment of conviction herein based upon the alleged contempt of Court set forth in these proceedings wherein petitioner was sentenced to two years additional imprisonment to commence at the expiration of the sentence the petitioner is now serving is excessive under the circumstances and in effect amounts to double punishment for the same crime if not double jeopardy and was an abuse by the lower Court of

its discertion which is reviewable by this Court (see *Worden* v. *Searls*, 121 U. S. 14, 30 L. Ed. 853, 7 S. Ct. 814).

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its powers should order the judgment, adjudging petitioner guilty of contempt, reversed and the matter remanded to the appropriate court, with directions that the government's motion to punish petitioner for contempt, be denied.

Respectfully submitted,

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Of Counsel:
MENAHEM STIM,
Member of the Bar of the Supreme Court of the United States.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 169—October Term, 1959.

(Argued December 9, 1959 Decided December 30, 1959.)

Docket No. 25644

UNITED STATES OF AMERICA,

Appellee,

—v.—

GIACOMO REINA,

Appellant.

Before:

SWAN and FRIENDLY, *Circuit Judges*, and
HERLANDS, *District Judge.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Dawson, *J.*, adjudging appellant guilty of criminal contempt of court for refusing to obey an order directing him to answer certain questions before a federal grand jury. Affirmed.

ALLEN S. STIM, *Attorney for Appellant.* Menahem Stim, of Counsel.

S. HAZARD GILLESPIE, JR., United States Attorney, *for Appellee.* Joseph DeFranco, Daniel P. Hollman, George I. Gordon, Assistant United States Attorneys, of Counsel.

Appendix

PER CURIAM:

Pursuant to 18 U. S. C. A. §401(3) appellant was convicted of criminal contempt of court and was sentenced to two years imprisonment for refusing to answer certain questions before a federal grand jury inquiring into alleged violations of the narcotics laws, after he had been granted immunity under 18 U. S. C. A. §1406 and had been ordered by the court to answer the questions. Judge Dawson's well reasoned opinion is reported in 170 F. Supp. 592.

Appellant attacks the constitutionality of §1406. His principal argument is that the immunity granted under this statute will not protect him from state prosecutions. That a federal immunity statute need not do so was settled long ago in *United States* v. *Murdock*, 284 U. S. 141.[1] He says that the courts should re-examine the *Murdock* decision. But, obviously, such re-examination is not for this court to make.

At the time of his appearance before the grand jury appellant was serving a prison sentence for conspiracy to violate the narcotic laws.[2] The grand jury sought to question him concerning this crime. Seizing upon certain expressions in *Brown* v. *Walker*, 161 U. S. 591, which sustained the constitutionality of a federal immunity statute similar to §1406, appellant makes the fantastic contention that §1406 is unconstitutional as applied to him because it does not grant a "general amnesty" or "pardon" for his

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[1] See also *Knapp* v. *Schweitzer*, 357 U. S. 371, 380; *Tedesco* v. *United States*, 6 Cir., 255 F. 2d 35; *Corona* v. *United States*, 6 Cir., 250 F. 2d 578, cert. den. 356 U. S. 954.

[2] His conviction was affirmed in *United States* v. *Reina*, 2 Cir., 242 F. 2d 302, cert. den. 354 U. S. 913.

past offense. The error in this argument is that it attempts to convert a general discussion in the *Brown* v. *Walker* opinion, page 601, as to the power of Congress to pass acts of general amnesty into an independent principle of law, requiring appellant's past offense to be pardoned. No authority is cited to support this extraordinary contention.[3]

Additional points made by appellant have been considered but are so plainly without merit that they require no discussion.

Judgment affirmed.

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[3] For decisions rejecting the contention, see *People ex rel. Hunt* v. *Lane*, 116 N. Y. S. 990, aff'd 196 N. Y. 520; *People* v. *Fine*, 19 N. Y. S. 2d 275; *People ex rel. Gross* v. *Sheriff*, 101 N. Y. S. 2d 271, aff'd 302 N. Y. 173.

FILE COPY

No. 661 29

In the Supreme Court of the United States

OCTOBER TERM, 1959

GIACOMO REINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 664

GIACOMO REINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–21) is reported at 273 F. 2d 234.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1959 (Pet. 19). The petition for a writ of certiorari was filed on January 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who had been granted immunity under 18 U.S.C. 1406, could properly be punished for contempt for his refusal to answer questions within the scope of that section.

2. Whether the immunity was required to include pardon of a past, finally adjudicated narcotics conviction of petitioner for an offense on which he was then serving his sentence.

3. Whether the sentence here was excessive.

STATUTE INVOLVED

18 U.S.C. 1406:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—
>
> (1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or
>
> (3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),
>
> is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness

shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit (Pet. 19–21) affirming the judgment of the District Court for the Southern District of New York which had convicted him of contempt for his refusal to answer questions before a grand jury (R. 50–51). A sentence of two years' imprisonment was imposed, subject to 60 days' opportunity for petitioner to purge himself of the contempt (R. 50).

On December 17, 1958, petitioner was ordered by the district court to answer certain questions before the grand jury, pursuant to the provisions of 18 U.S.C. 1406, *supra*, pp. 2–3 (R. 1, 16–17). He refused to do so (R. 25) on the ground that the immunity provided under the statute was insufficient under the Fifth and Fourteenth Amendments of the Constitution (R. 30). He did not claim that the questions asked were outside the scope of the statute.

ARGUMENT

1. (*a*) With respect to the question petitioner tenders as to whether the immunity granted by 18 U.S.C. 1406 extends to prosecution in the state courts, it is to be noted that this statute, in both its procedural and substantive aspects, is the same as the earlier 18 U.S.C. 3486(c), the immunity statute before the Court in *Ullmann* v. *United States,* 350 U.S. 422. The only difference is that the latter is concerned with compelling testimony in the area of national security, while Section 1406 is concerned with violations of the narcotics laws enacted pursuant to the congressional powers with respect to commerce and taxation. In its procedural aspects, Section 3486(c) was, in turn, unique among federal immunity statutes, though in its substantive phase it "is worded virtually in the terms of the 1893 Act" (*id.,* at 434) upheld in *Brown* v. *Walker,* 161 U.S. 591, the first federal statute to grant complete immunity from prosecution. Section 1406, here involved, was enacted on July 18, 1956, approximately four months after the *Ullmann* decision. In that case, the Court decided, on the basis of *Brown* v. *Walker* and clear legislative history showing that Congress intended to extend the grant of immunity to state prosecutions if it was within its power to do so, that Section 3486(c) does give such protection and, further, that it was within the power of Congress to provide for the national defense thus to forbid a State from prosecuting the witness, just as it was within congressional power, "in the name of the Commerce Clause" (350 U.S. at 436), to proscribe state prosecution of a witness granted immunity under the 1893 Act. *Brown* v. *Walker, supra.* Although there is no

similar legislative history underlying Section 1406, it would seem that in this context *Ullmann* v. *United States* is dispositive on this question.

(*b*) Petitioner points out that in *Tedesco* v. *United States,* 255 F. 2d 35, the Sixth Circuit, notwithstanding the agreement of the parties that Section 1406 "purports to grant to a witness testifying under compulsion both federal and state immunity" (p. 38) and its own interpretation that the statute "clearly undertakes to grant state as well as federal immunity" (p. 39; see also p. 40), expressed "grave doubt", in view of the historic exercise of "concurrent jurisdiction in narcotic matters," "that power resides with the Congress to grant immunity from prosecution in state courts pursuant to state narcotic laws" (p. 39). The court therefore declined to adopt the government's alternative position that the immunity granted by Section 1406 was intended to and does extend to state prosecutions. Instead, it invoked the doctrine that, wherever it is possible to do so, constitutional doubts should be avoided in construing a statute, and held that Section 1406 is separable and is valid as a grant of immunity only against federal prosecution. The court's authority for this holding was the general principle stated in *United States* v. *Murdock,* 284 U.S. 141, 149 (which the government had also invoked), that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."[1]

[1] It should be noted, however, that the *Murdock* case did not involve an immunity statute, but only a refusal by a witness in a federal proceeding to testify on the ground that he feared in-

In the instant case, too, the courts below rested upon the *Murdock* principle, rather than *Ullmann*, in rejecting petitioner's contention that Section 1406 does not protect him against state prosecution and is therefore constitutionally deficient. The court of appeals declined petitioner's plea that *Murdock* be re-examined, saying that "such re-examination is not for this court to make" (Pet. 20). Petitioner's renewal of that plea here is based upon his contention that Congress "exceeded its power in purporting to grant immunity 'in any court'" (Pet. 11). As to this, we believe that Congress has such power (see *supra*, pp. 4–5). In any event, we think it is clear that the case does not call for a re-examination of the actual holding of *Murdock*, for, as we have pointed out (fn. 1, pp. 5–6, *supra*), that case did not involve an immunity statute and, hence, raised no question as to the extent of the power of Congress to grant immunity against state prosecutions in legislating pursuant to its delegated powers and the complementary power to pass "necessary and proper" laws.

If there are doubts as to whether Congress intended to and could constitutionally extend the immunity of Section 1406 to state prosecutions, petitioner stands in

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crimination, not under federal law, but only under state law. As to this, the holding was that "Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2 [*i.e.*, the Supremacy Clause, which was the basis of the decision in *Brown* v. *Walker* that Congress could constitutionally grant immunity against state prosecution. 161 U.S. at 606–607. See also *Ullmann* v. *United States*, 350 U.S. at 434, 436]. The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country" (284 U.S. at 149).

no better position, for the *Murdock* principle[2] supports the holdings below and in *Tedesco* v. *United States*, *supra*, that he is entitled to no more than immunity from federal prosecution in exchange for his privilege under the Fifth Amendment.

Finally, the issues petitioner seeks to raise regarding the possibility of a state prosecution are premature. Such questions could arise directly only if state authorities were to undertake to prosecute a person "for or on account of any transaction, matter, or thing concerning which" he has testified under the compulsion of Section 1406 and only if the state courts were to reject his plea of immunity.[3] We submit that it will be time enough to raise these questions in the event such now-speculative circumstances should arise in the future. At this juncture, particularly in view of the recent *Ullmann* decision, these possibilities seem too remote to warrant consideration by this Court. As the Court said in *Brown* v. *Walker*, 161 U.S. at 608–609, in connection with the contention (rejected by the Court) that the 1893 Act did not give immunity against state prosecution:

> The same answer [that the danger of prosecution by another sovereignty is " 'a danger of

[2] See also *Mills* v. *Louisiana*, 360 U.S. 230; *Knapp* v. *Schweitzer*, 357 U.S. 371; *Feldman* v. *United States*, 322 U.S. 487. These latter cases involved state, not federal, immunity statutes.

[3] There can be no doubt that the actual testimony given under such circumstances could not be used in a state (or federal) prosecution in view of the interdiction of the last clause of the immunity provision of Section 1406. *Adams* v. *Maryland*, 347 U.S. 179.

an imaginary and unsubstantial character' "] may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity against the State, or even against the prosecutor if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing.

2. Petitioner contends that he was not guilty of contempt because the immunity failed to pardon "all past offenses," specifically, his conviction of a violation of the narcotics law several years before, pursuant to which he was then serving a five-year sentence (Pet. 13; R. 42). Petitioner cites no authority asserting such a proposition and adduces in support only a few general, preliminary utterances on "amnesty" from *Brown* v. *Walker,* 161 U.S. 591, 601, 602, which he has misconceived. The privilege against self-incrimination and the immunity that

supplants it relate, by definition, to what may lead to future incrimination of the witness, and not to a past conviction that has been completed and finally adjudicated. "The design of the constitutional privilege is * * * to protect him against being compelled to furnish evidence to convict him of a criminal charge." *Brown* v. *Walker*, 161 U.S. 591, 605; *People ex rel. Hunt* v. *Lane*, 116 N.Y.S. 990, 993–994, affirmed, 196 N.Y. 520; *People* v. *Fine*, 19 N.Y.S. 2d 275, 278–282.[4]

3. Petitioner complains of the two-year sentence as excessive, largely by reason of the sentence of five years imposed several years before. But the present sentence is obviously unrelated to the earlier sentence and has to do only with the present contemptuous refusal to give required testimony. Under the circumstances, particularly in view of the 60-day opportunity to purge himself of the contempt, the sentence was well within the discretion of the trial judge. *Brown* v. *United States*, 359 U.S. 41, 52.[5]

[4] Petitioner labors under similar misconceptions in his attempted reliance (Pet. 14) on the matter of a pardon for past offenses in *Burdick* v. *United States*, 236 U.S. 79, and on a limited and invalid attempt of a court itself to grant immunity, without statutory authority, in *Isaacs* v. *United States*, 256 F. 2d 654, 661 (C.A. 8).

[5] In our view, the 60-day purge provision in the district court's judgment is properly read as applicable for 60 days after final judicial disposition of the judgment, including action by this Court on the petition for certiorari.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
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Assistant Attorney General.
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J. F. BISHOP,
Attorneys.

March 1960.

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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. [redacted] 29

GIACOMO REINA,

Petitioner,

—against—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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July, 1960.

[illegible] — [illegible] — BEekman [illegible]

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IN THE

Supreme Court of the United States

October Term, 1959

No. 664

GIACOMO REINA,

Petitioner,

—against—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York is reported in 273 Fed. 2d 234 (R. 38-40).[1] The opinion of the United States District Court for the Southern District of New York, adjudging the petitioner to be in contempt of Court is cited as *In re Giacomo Reina*, 170 F. Supp. 592 (R. 29-34).

[1] Numerals in parentheses preceded by the letter R. refer to page numbers of the Transcript of Record.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance on appeal of the United States Court of Appeals for the Second Circuit.

Certiorari was sought on the grounds that the United States Court of Appeals for the Second Circuit has decided an important question of Federal Law which should be clarified and made more definite and certain; has decided a Federal question of substance not theretofore determined by this Court; and that the subject matter of this petition concerns constitutional questions concerning which this Court in the light of events, and applications of an earlier decision of this Court (*United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63 (1931)) in Federal criminal investigations and litigations, strongly suggests the advisability of a reexamination by this Court of the position formerly taken by it in the *Murdock* case.

The said judgment of affirmance of the United States Court of Appeals for the Second Circuit was entered on the 30th day of December, 1959 (R. 40). Thereafter, and on the 27th day of January, 1960, within the thirty day period specified by Rule 22 (2) of the Supreme Court Rules the petition for a writ of certiorari was filed with the Clerk of the Supreme Court of the United States. Certiorari was granted on April 4th, 1960, 362 U. S. 939, 4 L. ed. 2d 769 (R. 41).

Constitutional Provisions and Statutes Involved

The petitioner was prosecuted in the United States District Court for the Southern District of New York pursuant to Title 18 of the United States Code, Section 401 (3).

Constitution of the United States:

> "AMENDMENT V—CAPITAL CRIMES; DUE PROCESS
>
> No person shall be held to answer for a capital, or otherwise infamous crime, * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * * "

Title 18, United States Code, Sec. 401:

> "Sec. 401. Power of court
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

(The Immunity Provision of the Narcotic Control Act of 1956)

Title 18, United States Code, Sec. 1406:

> "Immunity of Witnesses
>
> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand

jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., Sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, C. 629, Title II, §201, 70 Stat. 574."

Questions Presented for Review

1. (A) Does the immunity provision of the Narcotic Control Act of 1956 (Title 18, Section 1406, United States Code), grant immunity from state prosecutions?

1. (B) If the aforementioned immunity provision does not grant immunity from State prosecutions, is said immunity coextensive with the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States, and in deciding this question, should not the Supreme Court of the United States re-examine the position it took in *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63?

2. On the facts of the present proceeding, was it not incumbent upon the Government to have made the petitioner a firm offer to excuse or remit any unserved portion of the earlier Federal conspiracy sentence that he was then serving and any unpaid fine or forfeiture imposed therein which penalties were based upon the same matters that he was questioned about before the Grand Jury in this proceeding under the purported grant of immunity of the aforementioned Federal Statute, before petitioner could be held in contempt of Court?

3. Was not petitioner denied due process of law by the failure of the District Court to inform him as to the nature of the immunity granted pursuant to Title 18, United States Code, Section 1406, before adjudging petitioner to be in contempt of Court?

4. Upon the facts herein was not the sentence of the petitioner, to two years imprisonment for contempt of court, excessive and an abuse of discretion?

Concise Statement of the Case

The contempt proceeding which resulted in the judgment of conviction herein was brought in the United District Court for the Southern District of New York pursuant to Title 18 of the United States Code, Section 401 (3) and arose out of the petitioner's refusal to testify before a Grand Jury and his invoking his privilege against self-incrimination on his being asked questions before said Grand Jury (R. 2-7, 8, 9, 12-14, 15, 16) after the aforesaid United States District Court (Edelstein, *J.*) by order dated December 17, 1958, directed him to so testify and which order purported to grant the petitioner immunity pursuant to Title 18 of the United States Code, Section 1406 as amended (R. 10-11).

At the hearing on the contempt proceeding held on the 22nd day of January, 1959, before Hon. Archie O. Dawson, United States District Judge, (R. 14-29) the petitioner opposed the Government's motion to punish him for contempt on the grounds that Title 18, Section 1406 of the United States Code is in violation of the Fifth and Fourteenth Amendments of the United States Constitution in that it does not provide the broad immunity contemplated by said amendments to the Constitution and that several of the questions propounded to the petitioner before the Grand Jury were not within the context of the meaning of the said Statute as enacted (R. 20-22).

By opinion dated January 29, 1959, the petitioner was found to be in contempt of Court, the District Court following the rationale of the decision of *United States* v. *Murdock, supra;* (R. 29-34). The petitioner was sentenced on said contempt to a term of imprisonment of two years with

a 60 day purge clause, said sentence to commence at the expiration of a sentence that petitioner was then serving.[2] Said opinion was reduced to judgment on the 2nd day of February, 1959 (R. 36-37).

The judgment of conviction was unanimously affirmed on appeal by the United States Court of Appeals for the Second Circuit (R. 38-40).

SUMMARY OF ARGUMENT

POINT I

THE IMMUNITY PROVISION OF THE NARCOTIC CONTROL ACT OF 1956 IS NOT COEXTENSIVE WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION (U. S. CONST, AMEND. V) THAT IT SEEKS TO REPLACE AND IS THEREFORE UNCONSTITUTIONAL.

A

THE NARCOTIC CONTROL ACT OF 1956 DOES NOT GRANT IMMUNITY FROM PROSECUTION BY THE STATE

Point I(A) deals with construction of the extent of the Narcotic Control Act of 1956, the petitioner maintaining

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[2] At the time of the contempt proceeding the petitioner was serving a sentence of 5 years imprisonment plus a fine of $10,000, for the crime of conspiracy to violate the Narcotic Laws of the United States (Title 21, United States Code, Secs. 173 and 174, Title 26, United States Code, Secs. 2553(a), and 2554(a) and 2606, and Title 18, United States Code, Sec. 371). Judgment was imposed in the United States District Court for the Southern District of New York on the 24th day of April, 1956 and petitioner completed service of this sentence at a date subsequent to the contempt proceedings herein on the 21st day of November, 1959, he having been credited with time spent in the Federal House of Detention since March 21, 1956, pending imposition of sentence. See *U. S.* v. *Reina*, 242 F. 2d 302; cert. denied sub. nom. *Maccio* v. *U. S.*, 354 U. S. 913, 1 L. ed. 2d 1427, 77 S. Ct. 1294.

that said Act cannot grant immunity from prosecutions by the State as the exercise of police power, more particularly enforcement of State narcotic laws, is a subject matter traditionally regulated by the respective States and is thus protected by U. S. Const. Amend. X.

POINT I

B

This Court Should Reexamine the Position That It Took in United States v. Murdock, supra, With a View to Reversing the Rationale of the Murdock Decision Which Is Destructive of the Constitutional Privilege Against Self Incrimination.

Point I(B) after analyzing precedent case law, the history of the privilege against self incrimination, construction by State courts of similar State Constitutional provisions in the States of Michigan, Kentucky, Florida, Louisiana and Illinois, foresees the ultimate results of the adoption of the *Murdock* decision by both Federal and State jurisdictions, as extinguishing the Privilege Against Self Incrimination guaranteed in both the Federal Constitution and the Constitutions of the various States, in fields wherein both the Federal and State Governments exercise jurisdiction, and urges reversal of the Murdock doctrine and the adoption of the "Michigan Rule" which construes the extent of the Privilege Against Self Incrimination as excusing from disclosure matters which would have a tendency to incriminate the witness in either the State or the Federal jurisdictions.

POINT II

THE FAILURE OF THE GOVERNMENT TO TENDER TO THE PETITIONER A GENERAL AMNESTY OR PARDON FOR THE UNSERVED PORTION OF AN EARLIER SENTENCE AND THE UNPAID FINE IMPOSED ON AN EARLIER FEDERAL NARCOTIC CONSPIRACY CONVICTION, CONDITIONED UPON THE PETITIONER TESTIFYING PURSUANT TO THE PROVISIONS OF THE IMMUNITY PROVISION OF THE NARCOTIC CONTROL ACT OF 1956 WAS A FATAL DEFECT OR OMISSION IN THE PROCEEDING AND WITHOUT WHICH THIS PETITIONER COULD NOT BE HELD IN CONTEMPT FOR FAILURE TO SO TESTIFY.

Point II is restricted to the facts of the present case wherein the witness at the time that the provisions of the Narcotic Control Act of 1956 were invoked against him was serving a then incompleted five year sentence and owed a $10,000. fine imposed on an earlier Federal Narcotic conspiracy conviction and it was facts constituting said prior crime that testimony was sought to be compelled of the petitioner in the present proceeding. This point after reviewing the history of immunity legislation, etc. urges that the failure of the Government prior to seeking said testimony to tender the petitioner a firm offer of a general amnesty for the unserved portion and unpaid fine imposed in the earlier Narcotic conspiracy conviction, was a fatal defect to the present contempt proceeding as without said firm offer the petitioner would be subjected to a penalty or forfeiture on account of the transaction, matter or thing concerning which it was sought to compel him to testify, despite the prohibition in the statute.

POINT III

THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE FAILURE OF THE LOWER COURT TO INFORM HIM AS TO THE EXTENT OF THE PURPORTED IMMUNITY GRANTED PURSUANT TO THE PROVISIONS OF THE NARCOTIC CONTROL ACT OF 1956.

POINT IV

THE SENTENCE OF PETITIONER TO TWO YEARS IMPRISONMENT FOR CONTEMPT OF COURT WAS EXCESSIVE AND AN ABUSE OF DISCRETION OF THE TRIAL COURT.

Point IV urges that it was an abuse of discretion by the Trial Court to sentence the petitioner on the contempt charge, subject to a sixty day purge clause, to two years imprisonment, said sentence to commence at the termination of a five year prison sentence that Petitioner was then serving on an earlier Federal Narcotic Conspiracy conviction, and it was to facts constituting said earlier Federal Narcotic Conspiracy that the questions giving rise to the present contempt proceeding related.

ARGUMENT

POINT I

The immunity provision of the Narcotic Control Act of 1956[3] is not coextensive with the privilege against self-incrimination (U. S. Const. Amend. V) that it seeks to replace and is therefore unconstitutional.

A

The Narcotic Control Act of 1956 Does Not Grant Immunity from Prosecution by the State

The language of the Narcotic Control Act of 1956 purporting to grant immunity reads as follows:

> "* * * But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him *in any Court*. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section." (Italics ours)

While the extent of the immunity granted has never been defined, as the Courts in passing upon contempts based upon this statute have relied on controlling case law without de-

[3] Act of July 18, 1956, C. 629, Title II, Sec. 201; 70 Stat. 574; Title 18, United States Code, Section 1406.

ciding this issue,[4] the United States Court of Appeals for the Sixth Circuit in *Tedesco* v. *United States*, 255 F. 2d 35 (U. S. C. A. 6th 1958) while affirming a contempt conviction based upon a refusal to answer questions pursuant to the immunity provisions of the aforementioned statute upon the authority of *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63 (1931),[5] expressed grave doubt that Congress has the power to grant immunity from state prosecution for violation of state narcotic laws. The Court of Appeals stated at page 39 as follows:

> "[4] The question must now be considered as to whether or not Congress has the constitutional power to provide the broad immunity intended. The area of congressional action in the instant case is not one pre-empted by the federal government. For example, see Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497, 76 S. Ct. 477, 100 L. ed. 640. Nor is paramount authority of the Congress in safeguarding national security involved, as it was in the Ullmann case which carefully limited the scope of its opinion to that area. Whether federal jurisdiction in the field of narcotic regulation is justified on the basis of the power to tax, the power to regulate commerce, or any other constitutional grant of power, both state and federal authorities have historically exercised concurrent jurisdiction in narcotic matters. We have grave doubt that power resides with the Congress to grant immunity from prosecution in

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[4] See *In re Reina*, 170 F. Supp. 592; *United States* v. *Pagano*, 171 F. Supp. 435 and *Corona* v. *United States*, 250 F. 2d 578 (U. S. C. A. 6th 1958); cert. denied 356 U. S. 954, 2 L. ed. 2d 847, 78 S. Ct. 921; Rehearing denied 356 U. S. 978, 2 L. ed. 2d 1152, 78 S. Ct. 1140.

[5] *United States* v. *Murdock* was again before this Court after trial to review errors committed by the District Judge on the trial. See 290 U. S. 389, 78 L. ed. 381, 54 S. Ct. 223.

> state courts pursuant to state narcotic laws; but we need not consider that point * * *."

While the language of the immunity provision of the Narcotic Control Act of 1956 is an almost verbatim repetition of the language used in the Immunity Act of 1954[6] which was declared constitutional in *Ullmann* v. *United States*, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497 and wherein the term "in any Court" as stated in said immunity act was held to cover both federal and state jurisdictions, it does not necessarily follow that the construction placed upon the statutory wording in said act and the act presently being examined should necessarily be identical.

In *Ullmann* v. *United States, supra*, this Court sustained the sweeping immunity granted by the Immunity Act of 1954 upon the power of Congress to provide for the national defense and complementary power, U. S. Const. Article 1, Sec. 8.[7]

That the power of the Federal Government to provide for the National defense is paramount to the power of the states in that field is further emphasized in the U. S. Const. Article 1, Sec. 10, Cl. 3 which provides:

> "No State shall, without the consent of Congress, * * * or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay."

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[6] Act of August 20, 1954, C. 769, Sec. 1; 68 Stat. 745; Title 18 United States Code, Section 3486.

[7] *Pennsylvania* v. *Nelson*, 350 U. S. 497, 100 L. ed. 640, 76 S. Ct. 477, decided a week after *Ullmann* v. *United States*, while covering the subject matter of preemption of a state sedition statute by a federal statute was based upon the power of Congress to provide for National defense etc. which is deemed to be so dominant in our federal system so as to preclude enforcement of state laws on the same subject matter once the federal government has acted in said field.

While the power of Congress to enact the sweeping provisions of the Immunity Act of 1954 was upheld by this Court in *Ullmann* v. *United States* (*supra*), it is of interest to note that at the time of the enactment of the said immunity act, Congress itself strongly doubted that it had the general power to ban state prosecutions for acts constituting violation of state law. In House Report No. 2606, 2 U. S. Code Congressional and Administrative News, 83rd Congress, Second Session 1954, Page 3059, wherein the House Committee on the Judiciary favorably reported the proposed bill, in discussing the question of granting immunity from State prosecution the majority committee report stated at page 3064 as follows:

> "* * * Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill. The language of the amendment that 'no such witness shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is so compelled to testify, after having claimed his privilege against self-incrimination, to testify or produce evidence,' is sufficiently broad to ban a subsequent State prosecution if it be determined that Congress has the Constitutional power so to do."
>
> * * * * * *
>
> "In limiting the area in which the grant of immunity may be exercised to Congressional investigations and grand jury and Court proceedings relating to the interference with or endangering of the National defense or security by means of certain specific Federal crimes, the possibility of subsequent State prosecutions are reduced to a bare minimum.

> It would be a rare instance under those conditions where the compelled testimony would incriminate the witness under State statute. * * *"[8]

There was no extensive House Report on the immunity provisions of the Narcotic Control Act of 1956 which was based upon said provision of the Immunity Act of 1954.

The power of the states to legislate in the field of narcotics is an exercise by them of their police power which has been traditionally exercised by the states. There is no common law offense against the United States[9] and this power is one of the powers reserved to the States by U. S. Const. Amend. X.

The power of the United States to legislate in the field of narcotics was sustained in a five to four decision in *United States* v. *Doremus*, 249 U. S. 86, 63 L. ed. 493 (1919). In that case the majority opinion sustained the constitutionality of the Harrison Narcotic Drug Act[10] under U. S. Const. Article 1, Sec. 8, which gives Congress power "To lay and collect taxes, duties, imposts and excises, * * *". This Court stated in its majority opinion at page 94:

> "Nor is it sufficient to invalidate the taxing authority given to Congress by the Constitution that the same business may be regulated by the police power of the State. License Tax Cases, 5 Wall, supra. * * *"[11]

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[8] See also Minority Report, pages 3066, 3071.

[9] *Jerome* v. *United States*, 318 U. S. 101, 87 L. ed. 640, 63 S. Ct. 483.

[10] 38 Stat. 785, 6 U. S. Comp. Stats. 1916, Sec. 6287g.

[11] License Tax Cases, 5 Wall 462.

The minority view in *United States* v. *Doremus, supra,* was that the Harrison Narcotic Drug Act was unconstitutional as an attempt by Congress to exert a power not delegated, the reserved police power of the states.

It is to be noted that an earlier immunity statute in a field traditionally regulated by the states specifically restricts its operation to the laws of the United States. The aforementioned statute is the immunity provision of the White Slave Traffic Act of 1910[12] which reads as follows:

> "(b) In any prosecution brought under this section, if it appears that any such statement required is not on file in the office of the Commissioner of Immigration and Naturalization, the person whose duty it is to file such statement shall be presumed to have failed to file said statement, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, may tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement."

It is quite obvious that in enacting the immunity provisions of the White Slave Traffic Act of 1910, Congress recognized its inability to grant immunity with regard to

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[12] Act of June 25, 1910, C. 395, Sec. 6; 36 Stat. 826; Comp. St. 1913 Sec. 8817; now Act of June 25, 1948, C. 645; 62 Stat. 813; Title 18 United States Code, Sec. 2424(b).

police matters traditionally administered by the respective states.[13]

The Bankruptcy Act of 1898[14] after providing that a bankrupt submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and others, the whereabouts of his property and all matters which may affect the administration and settlement of his estate goes on to state:

> "but no testimony given by him shall be offered in evidence in any criminal proceeding."[15]

In *Re Nachman et al.*, 114 F. 995 (Dist. Ct., D. So. Carolina 1902) construed such language to apply only to Federal Courts and not to the State jurisdiction and the District Court permitted the bankrupt to refuse to testify on his invoking the privilege against self-incrimination for fear of a state prosecution for larceny.

It was later held by this Court in *Arndstein v. McCarthy*, 254 U. S. 71, 65 L. ed. 138, 41 S. Ct. 26, that the aforementioned provision of the Bankruptcy Act was not coextensive with the privilege against self-incrimination, U. S. Const. Amend. V, and that said privilege could be invoked

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[13] See *United States* v. *Lombardo*, 228 F. 980 (Dist. Ct. W. D. Wash. N. D. 1915).

[14] Act of July 1, 1898, C. 541, Sec. 7; 30 Stat. 548; Title 11, United States Code, Sec. 25; amended by Act of May 27, 1926, C. 406, Sec. 4; 44 Stat. 663; amended by Act of June 22, 1938, C. 575, Sec. 1; 52 Stat. 847; amended by Act of July 7, 1952, C. 579, Sec. 4; 66 Stat. 422.

[15] The above statutory language is similar to the language condemned in *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195.

despite the aforementioned provisions of the Bankruptcy Act.

In *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 F. 827 (Dist. Ct. D. Conn. 1913), it was held that the immunity provision of the Sherman Anti-Trust Act[16] gives no immunity for prosecution for libel in a state court.

In *United States* v. *Lanza, et al.*, 260 U. S. 377, 67 L. ed. 314 (1922), a case arising under the Eighteenth Amendment, this Court in its decision made a statement at page 381 which is equally applicable to the present case, to wit,

> "• • • To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the ratio decidendi in Vigliotti v. Pennsylvania, 258 U. S. 403.
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> We have here two sovereignties, deriving powers from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. • • •"

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[16] Sec. 860, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 661); also Act of Feb. 25, 1903, C. 755, Sec. 1; 32 Stat. 904; Title 15, United States Code, Sec. 32.

From the aforementioned it is quite apparent that the Narcotic Control Act of 1956 does not nor can it grant immunity from state prosecution despite the similarity of its wording with that of the Immunity Act of 1954, the reason being that it is beyond the power of Congress to legislate immunity concerning violation of state narcotic laws, a subject that has traditionally been within the police power of the state and which is protected by U. S. Const. Amendment X.

B

This Court Should Reexamine the Position That It Took in *United States* v. *Murdock*[17] With a View to Reversing the Rationale of the *Murdock* Decision Which Is Destructive of the Constitutional Privilege Against Self-Incrimination

In *United States* v. *Murdock, supra,* the rule of law was definitely settled for the first time by this Court that a witness under examination in a federal tribunal could not refuse to answer on account of probable self-incrimination under state law.

The rationale of the Murdock decision has been severely criticized as being based upon an erroneous interpretation of the English Common Law, as being inconsistent with prior decisions, and as an unrealistic adoption to our federal system of government which if universally adopted by the various states would lead to the elimination of the privilege against self incrimination guaranteed in U. S. Const. Amendment V and in the various constitutions of the respective states in respect to criminal acts that may be

[17] 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63 (1931).

prosecuted by both the federal government and by various states.[18]

In *United States* v. *Murdock, supra,* the defendant was indicted for failure to supply information to an Internal Revenue Agent for the computation of a tax imposed under the Internal Revenue Laws of the United States, an indictable misdemeanor.[19] Murdock interposed the plea that he ought not to be prosecuted under the indictment because if he answered the questions below, he would have been compelled to become a witness against himself in violation of the 5th Amendment and caused to be subject to prosecution in the court below for violation of various laws of the United States.

The fact is that at the hearing before the Internal Revenue Bureau, Murdock, in refusing to answer, stated as follows at page 148:

> "And at the hearing appellee repeatedly stated that, in answering, 'I might incriminate or degrade myself,' he had in mind 'the violation of a state law and not the violation of a *Federal law*' . . . ."

This Court held that a demurrer to the special plea of the defendant should have been granted, holding that immunity

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[18] See J. A. C. Grant, Federalism & Self Incrimination, Part 1, *U. S.* v. *Murdock Revisited,* 4 U. C. L. A. Law Rev. 549; Part 2, *Common Law and British Empire Comparisons,* 5 U. C. L. A. Law Rev. 1; J. A. C. Grant, Immunity from Compulsory Self Incrimination in a Federal System of Government, 9 Temple Law Quarterly 57, 194 and 212; Allen, The Supreme Court, Federalism and State Systems of Criminal Justice, 8 U. of Chi. L. S. Rec. 3 (1958).

[19] Sec. 1114(a), Revenue Act of February 26, 1926; 44 Stat. at L. 116, Chap. 27; Sec. 146(a) Revenue Act of May 29, 1928; 45 Stat. at L. 835, Chap. 852.

against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him.

While this Court in deciding *United States* v. *Murdock*, *supra*, adopted the so called "English Rule," that the Common law privilege exempting witnesses from answering questions that would tend to incriminate them, does not protect witnesses against disclosing offenses in violation of the laws of another country and cited in support of that rule two English cases, to wit *Two Sicilies* v. *Willcox*, 7 State Tr. N. S. 1050, 1068 and *Reg* v. *Boyes*, 1 Best & S. 311, 330; 121 Eng. Reprint 730, it is respectfully submitted that neither of said cases supports the rationale of the decision in *United States* v. *Murdock* nor is the said "English Rule" applicable in the United States wherein we have a federal government and fifty states with overlapping and concurrent federal and state jurisdictions.

Two Sicilies v. *Willcox*, *supra*, in fact should be cited in opposition to the use of the so called "English Rule" in the United States as that decision is based upon the sole jurisdiction concept applicable to England where there is one sovereign authority and not the intertwining Federal and State jurisdictions that we have in the United States.

In *Two Sicilies* v. *Willcox* which involved a discovery proceeding in England wherein testimony was sought from agents of a revolutionary government in Sicily, the witnesses sought to invoke the privilege against self-incrimination on the grounds that their testimony might tend to expose them to prosecution in Sicily for violation of the

laws of that country. The English Court in denying the privilege in that case stated:

> " * * * It is to be observed that in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws and wilfully go within the jurisdiction of the laws he has violated. * * * I am of the opinion for these reasons in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our law."

Certainly the above quote requires no argument to distinguish the perils faced in the *Willcox* case from those faced by the petitioner who was called to testify before a Federal Grand Jury sitting within the State of New York.

Professor J. A. C. Grant in his Article entitled, Federalism and Self Incrimination, Part 2, Common Law and British Empire Comparisons, 5 U. C. L. A. Law Rev. 1, states that the Supreme Court of the United States in *United States* v. *Murdock, supra,* misconstrued the so called "English Rule". After reviewing the case of *Two Sicilies* v. *Willcox, supra,* and citing the distinctions hereinbefore pointed out, Professor Grant cited the later English case, *United States of America* v. *McRae,* L. R. 4 Eq. 327 (1867); affd. L. R. 3 Ch. 79 (1867). *United States of America* v. *McRae* involved a discovery proceeding in England in a suit by the United States as plaintiff against the defendant McRae, an agent of the Confederacy, concerning monies that he had been entrusted with. The defendant McRae in resisting the discovery proceeding pleaded his privilege against self incrimination and cited the forfeiture statute of the United

States. The plea of privilege was sustained. This ruling was later affirmed by the Court of Appeal.

East India Co. v. *Campbell*, 1 Ves. Sen. 246, 247; 27 Eng. Rep. 1010 (Ex. 1749), also involved a discovery proceeding in an English Court. Here the defendant in resisting the discovery proceeding interposed a demurrer claiming his privilege against self incrimination on the grounds that he was subject to punishment in India for the acts involved. The English Court sustained the privilege stating

> "for the government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals."

It is quite clear that there is no such "English Rule" as is stated in *United States* v. *Murdock, supra*, and that each of the cases stands on its own particular set of facts, the criterion apparently being the reality of the danger of prosecution in the foreign jurisdiction and the availability of the witness to the foreign jurisdiction—the peril of the witness to prosecution.

In *Reg* v. *Boyes, supra*, the other English case cited in *United States* v. *Murdock, supra*, the Court of Queens Bench was concerned with the claim of immunity of a witness in a bribery prosecution. The witness, one of the persons who allegedly received a bribe in an election, after being called to testify as a witness, invoked his privilege against self incrimination. He was thereupon handed a pardon under the Great Seal but still claimed his privilege. The matter was referred to the Court of Queens Bench where it was held that the witness was bound to answer. That Court dismissed the fear of the witness that he would

be subject to impeachment, which was not covered by the pardon as ridiculous, stating that in all of the numerous election bribery cases there was no instance of impeachment in a similar case, and that Parliament who had instituted the bribery investigation was instrumental in procuring the pardon. Said Court further stated that an impeachment would be out of the ordinary course of the law and that the witness was not in the slightest real danger from the testimony he was being asked to give.

Again in the English cases we have the test of *peril*, whether the testimony required of the witness "would tend to place him in peril".[20]

This test of "peril from prosecution" has been likewise applied in the United States in determining whether or not the privilege applies. Said test had been applied by the Federal Courts concerning compulsory incrimination under the laws of either the Federal Government or State Governments up till the decision in *United States* v. *Murdock*, which ignores the earlier line of cases.

In *United States* v. *The Saline Bank of Virginia, etc.*, 1 Peters 100, 26 U. S. 100, 7 L. ed. 69 (1828), which involved a bill of discovery filed in the United States District Court in Virginia against certain officers and stockholders of the Saline Bank of Virginia in their private capacities to charge them for certain deposits of funds made by them, the defendants by way of demurrer filed the following plea:

> "* * * and these defendants are advised and insist, that they ought not to be compelled to discover or to set forth any matters, whereby they may impeach or

[20] See *Ex parte Reynolds*, 20 Chancery Division 294 (1882).

> accuse themselves of any offence of crime, or be liable under the laws of the Commonwealth of Virginia, to penalties and grievous fines; * * * "

The United States District Court sustained said plea and dismissed the Bill.

In affirming the District Court, the Supreme Court of the United States by Mr. Chief Justice Marshall stated at page 104 as follows:

> "This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia. The Court below decided in favor of the validity of the plea, and dismissed the bill. It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it. The decree of the Court below is therefore affirmed."

Ballman v. *Fagin*, 200 U. S. 186, 50 L. ed. 433, 26 S. Ct. 212 involved a contempt arising out of the refusal of Ballman to testify and to produce certain records before a federal grand jury. Ballman on his claim of privilege feared incrimination under the laws of the State of Ohio. The Supreme Court of the United States in affirming the Circuit Court's reversal of the contempt conviction stated at page 195 as follows:

> "Not impossibly Ballman took this aspect of the matter for granted, as one which would be received by the Court without his emphasizing his own fears.

> But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop', and so subject to the criminal law of the State in which the grand jury was sitting. According to United States v. Saline Bank, 1 Peters, 100, he was exonerated from disclosures which would have exposed him to the penalties of the State law.* * *"

Since the decision of *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195, the landmark case affecting immunity legislation, the meaning of that decision has become as controversial as the constitutional privilege it sought to define.

Counselman v. *Hitchcock* involved the constitutionality of the so-called immunity provision of the Interstate Commerce Act which then read:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: * * *"[21]

In declaring said act unconstitutional, this Court stated with relation to the statute at page 564:

> "* * * It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a

[21] Revised Statutes Sec. 860.

criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.* * * "

And, at page 585:

" * * * It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect * * *

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

It is the same peril guarded against in *Counselman* v. *Hitchcock, supra,* that faces this petitioner in the State jurisdiction, as it is common knowledge that the federal and state jurisdictions cooperate and exchange information and it is a real and probable danger that the federal enforcement officers, without betraying the confidence of the grand jury, would make available to the state, leads and other evidence found as a result of the petitioner's testimony which although barred to the federal government as a subject of prosecution under the immunity provision of the Narcotic Control Act of 1956, may be used by a state for prosecution of violations of states narcotic laws as said inhibition from prosecution is not binding on the states in the enforcement of their laws.[22]

[22] This point is covered in Point I(A) of this brief.

Counselman v. Hitchcock, supra, unfortunately did not pass upon whether the privilege against self incrimination, U. S. Const., Amendment V, extended to testimony concerning violations of state law, as that case dealt with preferred rates and rebates in interstate commerce, a subject exclusively within the federal jurisdiction and which did not involve violation of State laws at that time.

In *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644, the successor to the immunity provision of the Interstate Commerce Act stricken down in *Counselman* v. *Hitchcock* was declared constitutional by a five to four decision. This provision reads as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission or in obedience to the subpoena of the Commission * * * on the ground or for the reason that the testimony or the evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."[23]

This statute by eliminating prosecution or penalty or forfeiture evaded the infirmity of the earlier statute. However this Court in deciding *Brown* v. *Walker* at pages 606 and 607 of its opinion while inferring that said statute also ap-

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[23] Act of February 11, 1893; 27 Stat. 443.

plied to state courts, held that the alleged fear of state prosecution in that case was not a real or probable danger—that the witness was not subject to actual peril.

Mr. Justice Shiras in his dissenting opinion however refused even to make such inference holding that as Congress could not create nor denounce state penalties for crimes it could not bind State courts in relation to State criminal prosecutions and that therefore the statute was unconstitutional *per se*.

While neither *Counselman* v. *Hitchcock*, *supra*, nor *Brown* v. *Walker*, *supra*, ever elaborated on the full extent of the privilege against self incrimination as guaranteed by the U. S. Const., Amend. V., they have been quoted in *United States* v. *Murdock*, *supra*, and other decisions as authority for justifying compulsion of testimony from witnesses, where said testimony might incriminate the witness under the laws of another domestic jurisdiction.[24] It is respectfully submitted that the two aforementioned cases do not justify such assumption.

The rationale of the decision of this Court in *United States* v. *Murdock* has come under mounting criticism within recent years. In *Knapp* v. *Schweitzer*, 357 U. S. 371, 2 L. ed. 2d 1393, 78 S. Ct. 1302, Mr. Justice Black with whom Mr. Justice Douglas joined, in his dissenting opinion at page 385, stated as follows, concerning the *Murdock* decision:

> "* * * Indeed things have now reached the point, as the result of United States v. Murdock, 284 U. S.

[24] See *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63; *Jack* v. *Kansas*, 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73; *Feldman* v. *United States*, 322 U. S. 487, 88 L. ed. 1408, 64 S. Ct. 1082.

> 141, 76 L. ed. 210, 52 S. Ct. 63, 82 ALR 1376, Feldman, and the present case, where a person can be whipsawed into incriminating himself, under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each. Cf. Irvine v. California, 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381; United States v. Kahriger, 345 U. S. 22, 97 L. ed. 754, 73 S. Ct. 510. I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government."

In *Ullmann* v. *United States*, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497, the *Murdock* decision was ignored despite the fact that the Solicitor General specifically cited it in his brief and the question in point called for the application of that decision, if in fact it still is the law.

Feldman v. *United States*, 322 U. S. 487, 88 L. ed. 1408, 64 S. Ct. 1082 and *Knapp* v. *Schweitzer*, *supra*, which involve the converse of *United States* v. *Murdock*, *supra*, likewise ignore the decision of *United States* v. *Murdock*, except for the aforementioned dissent in *Knapp* v. *Schweitzer*, *supra*.

The Courts of the State of Michigan hold that the privilege against self incrimination guaranteed under the constitution of the State of Michigan which contains a provision similar to U. S. Const., Amend. V[25] exonerates from

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[25] Constitution of the State of Michigan of 1908
Article 2, Declaration of Rights

> * * * Self-Incrimination; Due process of Law. Sec. 16. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

disclosure despite a state immunity statute whenever there is a probability of prosecution in state or federal jurisdictions.

In *People* v. *Den Uyl*, 29 N. W. 2d 284, 318 Mich. 645, 2 A. L. R. 2d 625, which involved an appeal by the state from a ruling of the Court below upholding the claim of privilege by the witness in refusing to testify on the grounds of self incrimination under the federal law despite a statutory grant of immunity under the laws of the State of Michigan, the Supreme Court of Michigan in upholding the claim of privilege stated at page 287 as follows:

> "* * *, and in the Cohen case we quoted from the Watson case the following [295 Mich. 748, 295 N. W. 482]: 'We are of the opinion that the privilege against self-incrimination exonerates from disclosure whenever there is a probability of prosecution in State or federal jurisdictions.'
>
> We are aware that holdings at variance with the above can be found in other jurisdictions, including holdings in the Federal courts. Nonetheless we adhere to our previous holdings, not alone on the grounds of established precedent, but rather that the holdings in the above cited cases are essential to render fairly effective the quoted State constitutional provision against self-incrimination. It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution. And it is self-evident that immunity granted under a State statute would be of no avail in a Federal prosecution.* * *"

See also *In re Watson*, 291 N. W. 652, 293 Mich. 263; *In re Schnitzer*, 295 N. W. 478, 295 Mich. 736; *In re Ward*, 295 N. W. 483, 295 Mich. 742 and *In re Cohen*, 295 N. W. 481, 295 Mich. 748.

Following the lead of the State of Michigan in adopting the so called "Michigan Rule" as enunciated in *People* v. *Den Uyl*, *supra*, are the States of Kentucky,[26] Florida,[27] and Louisiana.[28] In the Louisiana case the "Michigan Rule" was applied to testimony that would tend to incriminate the witness under the laws of a sister state, California, the test being—actual peril of prosecution.

The State of Illinois by statute has adopted the Michigan Rule. See *People* v. *Burkert*, 131 N. E. 2d. 495, 7 Ill. 2d. 506.[29]

In recent years many of the lower Federal courts while giving lip service to *United States* v. *Murdock*, *supra*, tend to circumvent said decision whenever possible on dubious distinctions.

In *Marcello* v. *United States*, 196 F. 2d. 437 (U. S. C. A. 5th, 1952) which involved a contempt of the United States

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[26] *Commonwealth* v. *Rhine*, 303 S. W. 2d 301 (Ct. of Appeals, Ky. 1957).

[27] *State* v. *Kelly*, 71 So. 2d 887 (Supreme Ct. of Florida 1954).

[28] *State ex rel. Doran* v. *Doran et al.*, 39 So. 2d 894, 215 La. 151 (Supreme Ct. of Louisiana 1949).

[29] Illinois Immunity Statute; Illinois Revised Statutes 1953, Chapter 38, Paragraph 580A, states that the Court shall deny the Attorney General's motion to compel a witness to testify under a grant of immunity "if it shall reasonably appear to the court that such testimony or evidence, documentary or otherwise would subject such witness to an indictment, information or prosecution * * * under the laws of another State or of the United States; * * *."

Senate pursuant to Title 2, U. S. C. A. Section 192, arising out of the witness invoking his privilege against self incrimination before Senator Kefauver's Crime Investigation Committee, a conviction for contempt was reversed upon the questionable grounds that the witness upon refusing to testify for fear of self incrimination when questioned about purely state crimes such as murder, may have had fear of incriminating himself of a federal crime that neither the committee nor the lower court could have known about *i.e.* Title 18 United States Code, Sections 2 and 1073 which involve flight to avoid giving testimony as a witness in a state, and aiding and abetting such flight.

The United States Court of Appeals for the Fifth Circuit in *Marcello* v. *U. S., supra,* in acknowledging that it was bound by the Supreme Court's decision in the *Murdock* case and while hoping that the Court reconsider its decisions in *United States* v. *Murdock* and *United States* v. *Feldman,* commented ironically at page 442, as follows:

> "The doctrine is so strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitutional privilege has been guarded because the penetentiary into which his answers may land him is under the supervision of the state instead of the federal government. * * *"

In *United States* v. *DiCarlo,* 102 F. Supp. 597 (United States District Court, N. D. Ohio E. D. 1952)[30] which also involved a prosecution for a contempt in violating Title 2, Section 192, U. S. C. A. arising out of the witness invoking his constitutional privilege against self incrimination be-

[30] See also *United States* v. *Licavoli,* 102 F. Supp. 607; *United States* v. *Aiuppa,* 102 F. Supp. 609.

fore the Senate Committee investigating crime, the United States District Court sitting without a jury found the defendant not guilty of contempt. In its opinion at page 602 the District Court asked itself the question:

> "There remains for determination the question whether the Committee, in the exercise of such powers, was required to respect the immunity of witnesses against self-incrimination for violations of state laws as well as the immunity of witnesses against disclosures that might subject them to prosecution by the federal government."

The Court went on to state at page 603 as follows:

> "* * * But in determining the rights of a witness who is interrogated about violations of state law by a federal agency, there is presented the serious and important question whether the immunity of the Fifth Amendment ought not to be extended to afford the witness protection against disclosures that might subject him to prosecutions under state law. That question was not decided in United States v. Murdock, supra, and, as will be shown, the Supreme Court observed that the Murdock case presented no question involving matter of 'state concern.' If the immunity of the Fifth Amendment can not thus be extended, the questions is—Does the federal government, investigating state crimes, possess the power to deny witnesses their right to immunity against self-accusation under the constitutions of the States?"

And at page 606:

> "[18] The foregoing considerations lead inescapably to the conclusion that the defendant is entitled to immunity against disclosures that might incriminate him of violations of state law as well as immunity

against self incrimination of a federal crime. If this conclusion can not be said to rest upon the principle of state supremacy in the domain of reserved powers, as hereinbefore discussed it finds ample support in the principle that the Fifth Amendment operates as a restraint upon federal officers investigating state crimes."

It is quite apparent that with the ever expanding assumption of jurisdiction by federal agencies and enforcement officers in areas formerly within the exclusive domain of the states, that the natural culmination of the doctrines expounded by *United States* v. *Murdock, supra,* and *Feldman* v. *United States, supra,* will be to extinguish the privilege against self incrimination that is guaranteed in the constitutions of the United States and of the individual states in the rapidly expanding fields where both the federal government and the respective states both exercise jurisdiction.[31]

Professor Grant, in his article, Federalism and Self Incrimination, Part 2, Common Law and British Empire Comparisons, 5 U. C. L. A. Law Rev. 1, 25 expresses the fear that the *Murdock* and *Feldman* decisions constitute a grave threat to the privilege against self incrimination guaranteed in the Constitution of the United States and in the various state constitutions and in conclusion he quotes Mr. Justice Black's dissent in *Irvine* v. *California,* 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381, wherein the following statement appears at page 140:

"I think the Fifth Amendment of itself forbids all federal agents, legislative, executive and judicial to

[31] See Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 U. of Chi. L. S. Rec. 3 (1958).

> force a person to confess a crime; forbids the use of such a federally coerced confession in any court, state or federal; and forbids all federal courts to use a confession which a person has been compelled to make against his will."[32]

The overruling of the *Murdock* and the *Feldman* cases it is submitted[33] and the adoption of the "Michigan Rule" in its place will return to the privilege against self incrimination the meaning that it had at the time the Constitution was adopted—the literal meaning of the words to wit—No PERSON * * * SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF—

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[32] See *Bram* v. *United States*, 168 U. S. 532, 543, 42 L. ed. 568, 18 S. Ct. 183.

[33] State Immunity Statutes and The Scope of the Privilege Against Self Incrimination, 26 University of Chi. Law. Rev. 164, as a solution of the problem raised by the *Murdock* and *Feldman* decisions advises (1) the overruling of said cases, (2) acceptance of the Michigan Rule and (3) voluntary extension of immunity by prosecuting sovereign so that witness can not show threat of prosecution.

POINT II

The failure of the Government to tender to the petitioner a general amnesty or pardon for the unserved portion of an earlier sentence and the unpaid fine imposed on an earlier federal narcotic conspiracy conviction,[34] conditioned upon the petitioner testifying pursuant to the provisions of the immunity provision of the Narcotic Control Act of 1956 was a fatal defect or omission in the proceeding and without which this petitioner could not be held in contempt for failure to so testify.

This is a case of concededly novel instance[35] wherein the petitioner who at the time he invoked his constitutional privilege against self incrimination after having been ordered to testify before a federal grand jury pursuant to the terms of a federal statute purporting to grant immunity, was then serving a prison sentence imposed by the same federal district court, for the crime of conspiracy to violate the Narcotic Laws of the United States[36] and wherein the

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[34] For details of the earlier Federal Sentence that petitioner was then serving see footnote 2 on page 7 of this brief.

[35] The United States Attorney for the Southern District of New York in his brief below to the United States Court of Appeals for the Second Circuit conceded that this is a case of novel instance on page 12 of said brief wherein he stated:

> "None of the federal cases cited by the Appellant's or in the Government's brief deals with a witness who has already been convicted of the crime concerning which he was being compelled to testify. However several New York State cases have dealt specifically with the problem * * *" (Citing cases).

[36] The earlier conviction of the petitioner for conspiracy to violate the Narcotic laws of the United States resulted after a trial. This petitioner did not testify in said case.

subject matter of the grand jury investigation concerned facts constituting said earlier crime (R. 2-7, 27).

While the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime (See *United States* v. *Gernie*, 252 F. 2d 664 (U. S. C. A. 2d 1958); cert. denied 356 U. S. 968, 2 L. ed. 2d 1073, 78 S. Ct. 1006), this rule does not apply in conspiracy convictions which by their very nature may leave the defendant subject to prosecution for the substantive crimes that he has been convicted of conspiring to violate.[37] This fact was in effect conceded by the government when it chose to invoke the immunity provisions of the Narcotic Control Act of 1956 with respect to the petitioner herein.

The pertinent provisions of the act in question are as follows:

> "* * * But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on ac-

[37] This petitioner still faces peril of federal prosecution for federal substantive violations of Title 21, United States Code, Sections 173 and 174 (sale and possession of Narcotics), Title 26, United States Code, Section 2553(a) (purchase or sale of Narcotics not in original stamped package), 2554(a) (sale of narcotics without written order), and 2606; also under the Penal Law of the State of New York, Sec. 580 (Conspiracy), Sec. 260 (attempt to commit crime), Secs. 1751 and 1752 (possession of narcotics), plus the criminal provisions of the Internal Revenue Laws of the United States, Title 26 U. S. C. A.

The statute of limitations in federal criminal offenses, not capital, is set forth in Title 18, United States Code, Section 3282 and is for 5 years. For criminal offenses arising under the Internal Revenue Act it is six years, Title 26, United States Code, Section 6531.

The statute of limitations for violation of the penal laws of the State of New York is for five years—New York State Code of Criminal Procedure, Sec. 142.

> count of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence, • • •."

The petitioner on being summoned before the grand jury claimed his privilege against self incrimination (R. 2-7, 8, 9, 11, 15). Thereafter he was ordered to testify before said grand jury pursuant to the immunity provision of the Narcotic Control Act of 1956 (R. 10-11, 12, 14, 15), however he was not offered an amnesty or pardon for the past federal offense conditioned upon his so testifying. It is this failure on the part of the government to grant an amnesty or pardon subject to the condition that the witness testify as ordered, that should necessitate a reversal of the contempt order *arguendo* the immunity provision of the Narcotic Control Act of 1956 is constitutional.

The immunity provision of the Narcotic Control Act of 1956 with certain exceptions not now in point, follows generally the language used in the Act of February 11, 1893, C. 83; 27 Stat. 443 which was approved by this Court in *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644. In *Brown* v. *Walker*, this Court defined the power of Congress to pass immunity statutes as coming within the scope of its power to pass acts of general amnesty, stating at page 601 as follows:

> "• • • The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Taylor on Evidence, Sec. 1455, where a large number of similar acts are collated), or in this country. Although the Constitution vests in the President

> 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' *this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction,* although as was said by this Court in Ex parte Garland, 4 Wall 333, 380, 'it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.' * * * " (Italics ours)

It is quite obvious that in *Brown* v. *Walker, supra,* the Court upheld the immunity provision in the Interstate Commerce Act on the basis of the power of Congress to grant general amnesty for past offenses.[38]

The term "amnesty" has been defined as "an act of oblivion for past offenses, granted by the Government to those who have been guilty of any neglect or crime usually upon condition that they return to their duty within a certain period * * *."[39]

"Amnesty" has also been defined as an act of pardon or oblivion by which crimes against the Government are so obliterated that they can never be brought into charge.[40]

The closest cases in point that the writer has been able to find are the amnesty and pardon cases arising after the Civil War with respect to earlier forfeiture statutes against sympathizers of the Confederacy.

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[38] See *Matter of Rouss,* 116 N. E. 782, 221 N. Y. 81, 87.

[39] Bouvier's Law Dictionary, Vol. 1, Rawles 3rd Ed. 1914, p. 189.

[40] Dictionary of English Law by Earl Jowitt, p. 114.

Knote v. *United States*, 95 U. S. 149, 24 L. ed. 442 was a case wherein Knote petitioned the United States for the return of the proceeds of the sale of real property that was seized from him pursuant to the Confiscation Act of 1862 by reason of his treason and rebellion against the United States. By proclamation dated December 25, 1868, the President of the United States granted a general pardon and amnesty to a class of persons that included Knote. Knote then petitioned for the return of the proceeds of the sale of the confiscated real property that formerly belonged to him. The petition was dismissed and the case finally came before this Court which affirmed the lower Court. In its decision in *Knote* v. *United States, supra*, this Court after reviewing the history of the terms "pardon" and "amnesty" held that the distinction between the two terms is not recognized in our law as the term "amnesty" is not used in the Constitution,[41] and that they are now used interchangeably and have the same effect. This Court stated at page 154 the rule with respect to the pardon power of the President concerning the return of condemned property as follows:

> "• • • However large, therefore, may be the power to pardon possessed by the President, and however extended may be its application, there is this limit to it, as there are to all his powers,—it can not touch moneys in the treasury of the United

[41] While in *Knote* v. *United States, supra*, the term pardon and amnesty related to the term "pardon" as used in our constitution, there is a very real difference between the terms pardon and amnesty in application. See *Burdick* v. *United States*, 236 U. S. 79, 59 L. ed. 476, 35 S. Ct. 267 where it was held that a witness could reject a presidential pardon and thus be permitted to invoke his privilege against self incrimination with respect to matters covered by the proposed pardon.

States, except expressly authorized by Act of Congress. The Constitution places this restriction on the pardoning power.

Where, however, property condemned, or its proceeds, have not thus vested, but remain under the control of the Executive, or of officers subject to his orders, or are in the custody of judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury in the other."

Ex parte Garland, 4 Wall 333, 71 U. S. 333, was another pardon and amnesty case arising after the Civil War, however unlike *Knote* v. *United States, supra,* which involved condemned property, the *Garland* case involved the right of Garland to practice as an attorney and counsellor at law before the Courts of the United States.

In *Ex parte Garland, supra,* Garland, who served as a representative of the State of Arkansas and later as a Senator from Arkansas in the Confederacy during the Civil War received a full pardon and amnesty from the President of the United States during July 1865. Garland then produced this pardon and sought permission to continue to practice as an attorney and counsellor at law before the Supreme Court of the United States without his taking the oath required by the then amended second rule of the Court which required the oath prescribed by the Act

of January 24, 1865, that the deponent has never voluntarily borne arms against the United States since he has been a citizen; has not given voluntary aid or encouragement to persons in armed hostility thereto; has never sought, accepted, or attempted to exercise any office under any authority or pretended authority in hostility to the United States; has not given voluntary support to any pretended government, authority or power, within the United States, hostile or inimical thereto; and that he will support and defend the Constitution of the United States.

In granting Garland's petition and rescinding the rule of the Court requiring said oath, this Court stated at page 381:

> "The pardon produced by the petitioner is a full pardon 'for all offenses by him committed, arising from participation, direct or implied, in the Rebellion', and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason, committed by his participation in the Rebellion. So far as that offense is concerned, he is placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the engagement of a previously acquired right, is to enforce a punishment for that offense notwithstanding the pardon. If such exclusion can be effected by the extraction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which can not be reached by direct legislation. It is not within the power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petition, therefore, the oath required by the act of January 24, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated."

The aforementioned Civil War pardon and amnesty cases while civil in nature are the closest cases in point to the subject matter presented in the present case[42] and the reasoning followed in said aforementioned decisions is equally applicable to the present case, a criminal matter.

Certainly the unserved portion of the prison sentence and the unpaid fine imposed in the earlier conspiracy conviction was within the scope of the power to pardon as enunciated in *Knote* v. *United States, supra;* and a general pardon or amnesty would certainly affect them under the reasoning of *In Re Garland, supra.*

It is self apparent also that the term general amnesty applies to the act or series of acts as such and all crimes that flow therefrom, as any so called amnesty applicable only to one specific crime where the act involved could be construed to constitute multiple crimes would be an empty gesture.

No doubt the clarity of the meaning of the terms pardon and amnesty in the field of criminal law prior to the adoption of immunity statutes such as the statute under attack herein, accounts for the lack of case law in the field.

It is apparent from the wording of the immunity provision of the Narcotic Control Act of 1956, from the history of immunity legislation and from the nature of immunity legislation in general, that the language of the aforementioned statute looks to both the future and to the past.

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[42] While *Knote* v. *United States, supra,* and *In re Garland, supra,* dealt with the Presidential pardon, U. S. Const. Art. 2, Sec. 2, Cl. 1, it was held that the ultimate effect of both pardon and amnesty is the same although in application they vary. See also *Burdick* v. *United States, supra.*

In enacting immunity legislation, Congress faces a very grave responsibility. It is incumbent upon Congress to forsee all of the implications involved in enacting such legislation. The problems and perils faced by Congress in enacting immunity legislation were elaborated on in House Report 2606, 2 U. S. Code Congressional and Administrative News, 83rd Congress, Second Session 1954, P. 3059, 3062, 3064 wherein the House Committee on the Judiciary, in favorably reporting out the then proposed Immunity Act of 1954 cited as an ill advised example of legislation, the Immunity Act of 1857, 11 Stat. 155 which resulted in an unforeseen "immunity bath."

Whereas in the past it has been held that testimony could not be compelled of an unwilling witness in violation of his privilege against self incrimination by forcing upon him a presidential pardon[43] nor could the Court on its own grant immunity[44] the present immunity statute is an act of the legislature which requires the concurrence of the executive (Attorney General) and the judiciary in the grant of immunity. In the ordinary case that should be sufficient.

Likewise in the ordinary case where a witness who is imprisoned pursuant to a judgment of conviction is questioned concerning facts that constitute the crime he was convicted of, it has been held that he must testify concerning said facts as he can no longer be incriminated[45] hence no immunity statute is necessary to compel said testimony.

The petitioner herein, at the time that the government sought to compel his testimony before a federal grand jury

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[43] See *Burdick* v. *United States*, *supra*.

[44] See *Isaacs* v. *United States*, 256 F. 2d 654 (U. S. C. A. 8th, 1958).

[45] *United States* v. *Gernie*, *supra*.

concerning violations of the Narcotic Laws of the United States was serving a sentence and owed a fine of ten thousand dollars imposed by the United States District Court for the crime of conspiracy to violate the Narcotic Laws of the United States, and it is facts that constituted said crime and its constituent substantive crimes that the Government sought to elicit from the petitioner by recourse to the immunity provisions of the Narcotic Control Act of 1956.

At the time the immunity provisions of the Narcotic Control Act of 1956 were invoked the petitioner already had been convicted of the nebulous crime of conspiracy, a crime wherein conviction on one set of facts alone does not protect from further jeopardy in the same jurisdiction, as prosecution for violations of the substantive crimes based upon the facts constituting the conspiracy is possible and often probable.

It is such a situation that either was overlooked by Congress in enacting the statute in question, or wherein by its very wording the said statute was meant to apply retrospectively. In either event the result is the same. It was incumbent upon the government to tender the petitioner a general pardon or amnesty in express language excusing him from further service of the earlier sentence and remitting the fine, said pardon or amnesty being conditioned upon the petitioner testifying truthfully pursuant to the immunity provision of the Narcotic Control Act of 1956 and in the absence of such firm offer, the petitioner could not be compelled to testify.

The ease by which waiver of the constitutional privilege could be implied and the particular wording of the statute

in question which would lead an unwary witness into waiving his privilege[46] called for extreme caution on the part of a witness, in this case the petitioner, and certainly the wording of the order of the District Court of December 17, 1958 (R. 10, 11) which ordered the petitioner herein to testify pursuant to the provisions of Title 18, United States Code, Section 1406, did nothing to allay petitioner's fears. In any event said order was not a firm commitment on the part of the government of a general pardon or amnesty conditioned upon petitioners testifying truthfully before a grand jury pursuant to the immunity provisions of the Narcotic Control Act of 1956,[47] and therefore said order was not a proper basis upon which to bottom a contempt proceeding in the face of a claim of privilege against self incrimination as it did not grant this petitioner immunity

[46] Both the Immunity Act of 1954, Act of Aug. 20, 1954, C. 769, Sec. 1; 68 Stat. 745; Title 18, United States Code, Sec. 3486 and the Immunity Provision of the Narcotic Control Act of 1956; Act of July 18, 1956, C. 629, Title II, Sec. 201; 70 Stat. 574; Title 18, United States Code, Sec. 1406, contain the proviso that the witness must give testimony or produce evidence, *after having claimed his privilege against self incrimination*, before immunity is conferred. It appears that a witness ordered to testify pursuant to said statutes who fails to claim his privilege against self incrimination before so testifying or producing evidence obtains no immunity.

[47] It appears that the only procedure for petitioner to follow in order to protect his rights was to continue to refuse to testify and seek recourse to the highest court in the absence of a firm offer of pardon or amnesty in exchange for his testimony, as once the testimony is given in the absence of said offer the harm is done and petitioner has no recourse as the courts do not infer amnesty where none is given. See *Hunt* v. *Lane*, 116 N. Y. S. 990, 132 App. Div. (N. Y.) 406; aff'd 89 N. E. 1108, 196 N. Y. 520. (Did not involve a contempt but was a Habeas Corpus proceeding wherein relator sought freedom from prison sentence because of fact that he subsequently testified before a grand jury. See also *People* v. *Fine*, 19 N. Y. S. 2d 275 (Supreme Ct. Orange County 1940).)

coextensive with the constitutional privilege it sought to replace and therefore was unconstitutional in its application to this petitioner and no contempt proceeding could therefore be based on a refusal to obey said order.

POINT III

The petitioner was denied due process of law by the failure of the lower Court to inform him as to the extent of the purported immunity granted pursuant to the provisions of the Narcotic Control Act of 1956.

This point is based directly on the prior Points herein and arises out of the failure of the District Court to instruct the petitioner as to his rights to wit: To fully and fairly inform petitioner as to the extent of the immunity conferred by the statute (Point I). See *People* v. *Brayer*, 179 N. Y. S. 2d 248, 251, 6 App. Div. 2d 437; and the effect of petitioner's testimony pursuant to the provisions of Title 18, United States Code, Sec. 1406 upon the unserved portion of the sentence and unpaid fine of ten thousand dollars imposed upon petitioner on the earlier conviction for conspiracy to violate the Narcotic Laws of the United States (Point II).

POINT IV

The sentence of petitioner to two years imprisonment for contempt of court was excessive and an abuse of discretion of the Trial Court.

The sentence of the Court below (R. 34) and the judgment of conviction entered thereon (R. 36, 37), based upon an alleged contempt of court set forth in these proceedings, wherein the petitioner, under claim of constitutional right, refused to answer certain questions concerning matters upon which a prior Federal Narcotic conspiracy conviction against him was based and for which he was then serving a five year prison sentence plus a $10,000 fine (R. 27), was excessive where said sentence ordered, that subject to a sixty day purge clause, the petitioner be imprisoned for an additional term of two years, said sentence to commence at the expiration of the prison term that the petitioner was then serving for the earlier offense. If not double jeopardy, such a sentence amounts to double punishment for the same crime and was an abuse by the lower Court of its discretion and is subject to review by this Court. See *Worden* v. *Searles*, 121 U. S. 14, 30 L. ed. 853, 7 S. Ct. 814.

CONCLUSION

The conviction of the petitioner should be reversed and the matter remanded to the District Court with directions that the Government's motion to punish petitioner for contempt be denied.

Respectfully submitted,

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July, 1960.

No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1960

GIACOMO REINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

563201—60——1

Constitution and Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 29

GIACOMO REINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 38–40) is reported at 273 F. 2d 234.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1959 (R. 40). The petition for a writ of certiorari was filed on January 27, 1960, and was granted on April 4, 1960 (R. 41). 362 U.S. 939. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1406, which permits the Federal Government, upon granting immunity from pros-

ecution, to compel incriminating testimony concerning violations of federal narcotic laws, violates the federal constitutional prohibition against compulsory self-incrimination.

2. Whether, as a condition to requiring petitioner to testify pursuant to such immunity, the Government was required to pardon him for a previous narcotic conviction for which he was then serving his sentence.

3. Whether petitioner's conviction of contempt for refusal to testify before a grand jury, after he had been given the aforesaid statutory immunity, was invalid because the trial court did not advise him of the extent of such immunity.

4. Whether the sentence of two years' imprisonment was excessive.

STATUTE INVOLVED

18 U.S.C. 1406:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—
>
> (1) any provision of part I or part II or subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

Petitioner was convicted of contempt for refusal to answer questions before a federal grand jury that was investigating possible violations of federal narcotic laws, after he had been granted immunity from prosecution (R. 36-37). He was sentenced to two years' imprisonment, the sentence to be vacated if within 60

days he purged himself by answering the questions (R. 34, 37). The court of appeals unanimously affirmed the conviction (R. 38–40).

On December 5, 1958, petitioner, pursuant to a subpoena, appeared before a federal grand jury sitting in the Southern District of New York (R. 30). Petitioner was then serving a five-year sentence for a federal narcotic offense (R. 15; *United States* v. *Reina*, 242 F. 2d 302 (C.A. 2), certiorari denied *sub nom. Moccio* v. *United States*, 354 U.S. 913). Petitioner was asked a number of questions with respect to narcotics (R. 2–7), which he refused to answer on the ground of self-incrimination (R. 30). In accordance with the provisions of 18 U.S.C. 1406 (*supra*, pp. 2–3), the Attorney General authorized the United States Attorney to seek a court order directing petitioner to testify and produce evidence before the grand jury (R. 910, 30). The district court entered such an order (R. 10–11), the effect of which was to grant petitioner immunity from prosecution, penalty, or forfeiture with respect to any matter about which he was compelled to testify following his claim of self-incrimination.

When petitioner again appeared before the grand jury, he refused to answer the questions (R. 15–16, 30). An order to show cause why petitioner should not be punished for contempt was then issued (R. 12–13).

At the hearing on the order (R. 14–29), petitioner contended that 18 U.S.C. 1406 is unconstitutional under the Fifth and Fourteenth Amendments because it allegedly does not confer immunity from state

prosecution (R. 21–22).[1] The district court upheld the constitutionality of the statute on the ground that testimony may constitutionally be compelled by the Federal Government upon a grant of immunity from federal prosecution, "whether or not the testimony would be incriminating under the laws of another jurisdiction" (R. 32). It ruled (R. 33–34) that, in view of the immunity conferred, petitioner could constitutionally be required to testify before the grand jury, and that his refusal to do so constituted contempt. The court directed that petitioner be imprisoned for two years, to commence at the expiration of the sentence he was then serving (R. 34–37).[2] However, recognizing that petitioner's refusal to answer the questions "when first addressed to him may have been a procedural device to secure a determination of the issue of law which he presented," the court provided that if within 60 days petitioner "purge[s] himself of his contempt by answering the questions which have been addressed to him by the Grand Jury * * * the sentence imposed herein will be vacated" (R. 34–37).

SUMMARY OF ARGUMENT

The principal issue in this case is whether the immunity provision of the Narcotic Control Act of 1956 (18 U.S.C. 1406) violates the federal constitutional prohibition against compulsory self-incrimination.

[1] Although petitioner initially contended that some of the questions asked were outside of the scope of the statute (R. 20–21), he subsequently abandoned that contention (R. 24).

[2] The district court granted petitioner bail in the instant case. By order of February 1, 1960, Mr. Justice Harlan continued petitioner on bail pending the final disposition of the case by this Court.

The court of appeals, relying upon *United States* v. *Murdock,* 284 U.S. 141, held the provision constitutional on the ground that incriminating testimony may be compelled by the Federal Government if it grants immunity from federal, although not from state, prosecution. We agree with that position. We also believe, however, that the decision below may be sustained on the alternative ground that Section 1406 also confers immunity from state prosecution, and that such grant of state immunity is constitutional. Accordingly, in our view there is no occasion for this Court to consider petitioner's contention that *Murdock* should be reexamined and overruled.

I

A. Section 1406 provides that no witness compelled thereunder to testify with respect to possible violations of federal narcotic laws "shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled * * * to testify * * *, nor shall testimony so compelled be used as evidence in any criminal proceeding [except prosecution for perjury or contempt committed while giving compelled testimony] against him in any court." On its face, this broad grant of immunity from prosecution or "any" penalty or forfeiture, on account of "any" matter with respect to which testimony is compelled, covers all criminal proceedings, state as well as federal. "The act in question contains no suggestion that it is to be applied only to the Federal courts" (*Brown* v. *Walker,* 161 U.S. 591, 607).

Section 1406 contains virtually the same language as the Immunity Act of 1954 (18 U.S.C. 3486(c)), dealing with national security. In *Ullmann* v. *United States,* 350 U.S. 422, this Court held that the latter Act grants immunity from state as well as from federal prosecution. It relied upon the legislative history of the 1954 Act which stated (H. Rep. No. 2606, 83d Cong., 2d Sess., p. 7) that the language "is sufficiently broad to ban a subsequent State prosecution * * *." The Court in *Ullmann* also relied upon *Brown* v. *Walker,* 161 U.S. 591, where a similar prohibition against prosecution granted by the Immunity Act of February 11, 1893, 27 Stat. 443, for compelled testimony before the Interstate Commerce Commission, was held to "grant protection against prosecution in the state courts" (350 U.S. at 434).

The 1956 Act here involved was enacted approximately four months after the *Ullmann* decision. In light of the *Brown* holding that a similar broad grant of immunity covered state prosecution, the legislative history showing that Congress intended to confer state immunity in the 1954 Act, and the use of virtually the same language in the 1956 Act as was used in the 1954 Act, we submit that the 1956 Act, like its predecessor, grants state, as well as federal, immunity.

B. 1. *Ullmann* v. *United States, supra,* also held that the federal grant of state immunity in the 1954 Act is constitutional. The rationale was that Congress was acting within the scope of its constitutional power to provide for the national defense, and that the grant of immunity from state prosecution was "necessary and proper for carrying into Execution"

such "conceded federal power" (350 U.S. at 436).

Federal narcotic legislation rests on just as clear "conceded federal power" as the national security legislation involved in *Ullmann*. The federal authority over narcotics does not rest solely on the taxing power, as petitioner apparently suggests, but also on the commerce and treaty powers. Indeed, control of import of narcotics—a matter of exclusive and explicit federal power—is the basic pillar of all federal narcotic legislation, without which effective regulation would be virtually impossible. In these circumstances, no valid distinction can be made between *Ullmann* and this case on the ground that *Ullmann* involved national defense and this case involves narcotics.

2. The grant of state immunity in Section 1406 is just as "necessary and proper for carrying into Execution" the broad Congressional authority over narcotics as the immunity provision for national security cases sustained in *Ullmann*. As this Court long ago recognized (*Nigro* v. *United States*, 276 U.S. 332, 343–344), and as the legislative history of the Narcotic Control Act of 1956 shows, the ease with which narcotics can be concealed and the clandestine character of the traffic make it essential that there be effective enforcement powers. Section 1406 "reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution" (see *Ullmann*, *supra*, at 436); it was one of several provisions which Congress included in order to permit en-

forcement officers to operate more effectively (H. Rep. No. 2388, 84th Cong., 2d Sess., p. 10). Here, as in *Ullmann*, there is no broad-scale or general supersession of state law. State immunity is conferred only in those cases where the Attorney General and the United States Attorney determine that the testimony of a particular witness is "necessary to the public interest," and that he should therefore be immunized from state prosecution in order to enable the Federal Government to obtain evidence that would otherwise be unavailable.

3. The fact that, despite the extensive federal narcotic regulation, the states still retain substantial authority in this field does not invalidate the federal grant of state immunity for particular cases. For federal power, otherwise validly exercised, is not invalid because "the same business may be regulated by the police power of the State" (*United States* v. *Doremus*, 249 U.S. 86, 94). And, once it be established that the federal legislation is within the power of Congress (as is the case here), it is the "supreme Law of the Land" to which any inconsistent state law must bow. See *Adams* v. *Maryland*, 347 U.S. 179, 183.

II

If the Court should reject our contention that 18 U.S.C. 1406 constitutionally confers immunity from both state and federal prosecution, it would then have to consider petitioner's contention that *United States* v. *Murdock*, 284 U.S. 141, should be overruled and that the Court should adopt the rule that the Federal

Government can compel incriminating testimony only by conferring immunity from both state and federal prosecution. If the Court finds it necessary to reach this question, we submit that the unanimous decision in *Murdock* that the Fifth Amendment protects only against prosecution under federal law is correct and should be reaffirmed.

The basic rationale of *Murdock* is that under our federal system "full and complete *immunity against prosecution by the government compelling the witness to answer* is equivalent to the protection furnished by the rule against compulsory self-incrimination" (284 U.S. at 149; emphasis added). The same rationale—that the Fifth Amendment "protect[s] only against invasion of civil liberties by the Government whose conduct [it] alone limit[s]"—was reasserted in *Feldman* v. *United States*, 322 U.S. 487, 489, and, more recently, in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380.

Petitioner attacks *Murdock* on the ground that the Court there misinterpreted two English cases upon which it relied. The decision in *Murdock*, however, basically rested on the inherent character of our federal system, not the English precedents; the Court also relied upon four of its own leading cases involving the scope of the privilege against self-incrimination. Petitioner also contends that it is unfair to permit the states to prosecute for crimes disclosed in testimony compelled by the Federal Government. This claim, however, is not a valid basis for extending the federal constitutional privilege to an area that it was never intended to reach. Any possible unfair-

ness can be dealt with by reciprocal federal and state legislation.

III

The three other grounds upon which petitioner challenges his conviction of contempt are without merit.

A. The Government was not required, as a condition to requiring petitioner to testify pursuant to the grant of immunity, to pardon him for a prior narcotic conviction for which he was then serving his sentence. The constitutional privilege against self-incrimination is designed solely to protect a witness against future prosecution; it was never intended to, and does not, exonerate for past convictions. Section 1406 gives petitioner full protection against future prosecution.

B. Petitioner's conviction of contempt was not rendered invalid by the fact that the trial court did not advise him of the extent of immunity under the Act. Although sentencing petitioner to two years' imprisonment, the trial court gave him sixty days within which to purge himself by answering the questions. We construe the purge period as running from the date of final disposition of this case, including the action of this Court. Petitioner plainly can suffer no prejudice from the fact that the trial court did not advise him of the extent of his immunity. For after this Court determines the extent of that immunity, petitioner will have ample time within which to make an informed choice between answering the questions and going to jail.

But whatever the effect of the purge provision, petitioner's refusal to testify was nevertheless contemptuous. Petitioner was represented by counsel in the contempt proceedings; the court could not alter the scope of the immunity, which was fixed by Congress; the court in no way misled petitioner as to his immunity; and petitioner did not request advice from the court on that issue. In these circumstances, the court was not required to explain to petitioner, prior to directing him to answer, its view as to the scope of the immunity.

C. The sentence of two years' imprisonment was not an abuse of the district court's discretion. The fact that petitioner was then serving a five-year sentence for a prior narcotic conviction is immaterial. The two sentences were for entirely different offenses: the prior sentence was for conspiracy to violate the narcotic laws, and the instant sentence was for the contemptuous refusal to give testimony as directed by the court. Comparable sentences have been upheld in other narcotic contempt cases based on refusal to testify following the granting of immunity under 18 U.S.C. 1406.

ARGUMENT

The principal issue in this case is whether the immunity provision of the Narcotic Control Act of 1956 (18 U.S.C. 1406) violates the federal constitutional prohibition against compulsory self-incrimination. The statutory provision authorizes the Federal Government to compel incriminating tes-

timony and evidence in narcotics cases, but grants immunity with respect to matters thereby disclosed. For more than 60 years, it has been settled that incriminating testimony may be compelled if the witness is given immunity from prosecution that is coextensive with the privilege against self-incrimination. *Counselman* v. *Hitchcock,* 142 U.S. 547; *Brown* v. *Walker,* 161 U.S. 591; *Hale* v. *Henkel,* 201 U.S. 43; *Ullmann* v. *United States,* 350 U.S. 422, 429–431. The constitutional validity of 18 U.S.C. 1406 accordingly turns on whether the immunity therein conferred is as broad as the privilege.

The court of appeals, relying upon *United States* v. *Murdock,* 284 U.S. 141, held the provision constitutional on the ground that incriminating testimony may be compelled by the Federal Government if it grant immunity from federal, although not from state, prosecution. Petitioner urges this Court to reexamine and overrule *Murdock.* We believe, however, that the decision below may be sustained on the alternative ground that Section 1406 confers immunity from state, as well as federal, prosecution, and that the grant of state immunity is constitutional. Accordingly, there is no occasion for this Court to reexamine *Murdock.* But we shall further argue that, if *Murdock* is to be reexamined, it is correct and should be reaffirmed. Finally, we shall show that none of the other grounds upon which petitioner challenges his corrupt conviction has merit.

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I

18 U.S.C. 1406 CONSTITUTIONALLY CONFERS IMMUNITY FROM BOTH STATE AND FEDERAL PROSECUTION

A. THE IMMUNITY EXTENDS TO STATE PROSECUTION

Section 1406 (*supra*, pp. 2–3) provides that no witness compelled thereunder to testify with respect to possible violations of federal narcotic laws

> shall be *prosecuted* or subjected to *any* penalty or forfeiture for or on account of *any transaction, matter, or thing* concerning which he is compelled * * * to testify or produce evidence, nor shall testimony so compelled be used as evidence *in any criminal proceeding* (except prosecution described in the next sentence) against him *in any court.* No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section [emphasis added].

On its face, this broad grant of immunity from prosecution or "any" penalty or forfeiture, on account of "any" matter with respect to which testimony is compelled, covers all criminal proceedings, state as well as federal. As this Court stated, in holding that the statutory prohibition upon the use "in any criminal proceeding * * * in any court" of testimony given before a Congressional committee (18 U.S.C. 3486(a)(2)) covers both state and federal courts, "[l]anguage could be no plainer" (*Adams* v. *Maryland*, 347 U.S. 179, 181). "The act in question contains no suggestion that it is to be applied only to the

Federal courts" (*Brown* v. *Walker*, 161 U.S. 591, 607).[3]

The only limitation upon this broad immunity is that provided by the statute itself, namely, the immunity does not extend to prosecutions for perjury or contempt committed while giving the compelled testimony or producing the compelled evidence. Had Congress intended further to limit the immunity to federal prosecutions, it presumably would have specifically so provided—as it did in the Mann Act (36 Stat. 826, as amended, 18 U.S.C. 2424(b)), upon which petitioner relies (Br. 13), where it granted immunity only from prosecution, penalty or forfeiture "under any law of the United States." See *infra*, n. 10, p. 27.

The language of the Immunity Act of 1954 (18 U.S.C. 3486(c)) is virtually identical to Section 1406, except that it deals with national security rather than narcotics. In *Ullmann* v. *United States*, 350 U.S. 422, this Court held that the 1954 Act grants immunity from state as well as from federal prosecution. The Court quoted (350 U.S. at 435) the following passage from the House Judiciary Committee Report on the 1954 Act (H. Rep. No. 2606, 83d Cong., 2d Sess., p. 7,

[3] In *Tedesco* v. *United States*, 255 F. 2d 35, 39 (C.A. 6), the court, although questioning, but not deciding, the power of Congress to grant immunity from state narcotic prosecutions (but see *infra*, pp. 18–28, where we show that Congress has such power), concluded that 18 U.S.C. 1406 "clearly undertakes to grant state as well as federal immunity." In *United States* v. *Pagano*, 171 F. Supp. 435, 438, n. 1 (S.D. N.Y.), the court stated: "There is no doubt that the statute * * * on its face purports to grant immunity from state prosecutions." Cf. also *Corona* v. *United States*, 250 F. 2d 578, 579 (C.A. 6), certiorari denied, 356 U.S. 954.

emphasis added) as "support[ing] the broad interpretation of the Act before us":

> Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill.[4] *The language of the amendment * * * is sufficiently broad to ban a subsequent State prosecution* if it be determined that the Congress has the constitutional power to do so. In addition, the amendment recommended provides the additional protection—as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.
>
> By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved.

The Court in *Ullmann* also relied upon *Brown* v. *Walker,* 161 U.S. 591. There, it was pointed out (350 U.S. at 434), a similar "prohibition against prosecution" granted by the Immunity Act of February 11, 1893, 27 Stat. 443, for compelled testimony before the Interstate Commerce Commission, was held to "grant protection against prosecution in the state courts." *Ullmann* quoted (350 U.S. at 434–435) the following language from the *Brown* opinion (161 U.S. at 607–608, italics in original):

> The act in question contains no suggestion that it is to be applied only to the Federal courts.

[4] The Court further held that this grant of immunity from state prosecution is constitutional (350 U.S. at 435–436). As we show *infra* (pp. 18–28), this holding in *Ullmann* is also applicable to the statute involved in the instant case.

> It declares broadly that "no person shall be excused from attending and testifying * * * before the Interstate Commerce Commission * * * on the ground * * * that the testimony * * * required of him may tend to incriminate him," etc. "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes * * * also cognizable under state laws; but the immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.

The 1956 Act (here involved) was enacted on July 18, 1956, approximately four months after the *Ullmann* decision. In the light of the *Brown* holding that a similar broad grant of immunity covered state prosecution, the clear legislative history that Congress intended to confer state immunity in the 1954 Act, and the use of virtually the same language in the 1956 Act as was used in the 1954 Act, we do not think it is significant that the legislative history of the 1956 Act fails specifically to deal with the question whether state immunity was provided. In the absence of any affirmative indication that Congress did not intend the 1956 immunity provision to have the same scope as the

1954 Act, we submit that the 1956 Act, like its predecessor, grants state, as well as federal, immunity.

B. THE GRANT OF IMMUNITY FROM STATE PROSECUTION IS CONSTITUTIONAL

Ullmann v. *United States, supra,* held not only that the immunity provided by the 1954 Act extends to state prosecution, but that the federal grant of such state immunity is constitutional. Petitioner attempts (Br. 13–19) to distinguish *Ullmann* on the ground that the authority of Congress to grant state immunity was rested on the "paramount" "power of the Federal Government to provide for the National defense" (Br. 13); but that Congress has no comparable power "to legislate immunity concerning violation of state narcotics laws, a subject that has traditionally been within the police power of the state and which is protected by the Tenth Amendment (Br. 19). This argument is based upon a misconception of the rationale of *Ullmann.*

1. In rejecting Ullmann's challenge to "the constitutional power of Congress to grant immunity from state prosecution" (350 U.S. at 435), the Court stated (p. 436):

> [I]t cannot be contested that Congress has power to provide for national defense and the complementary power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8, cl. 18. The Immunity Act is concerned with the national security. It

> reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution. We cannot say that Congress' paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of state power for the more effective exercise of conceded federal power. We have already, in the name of the Commerce Clause, upheld a similar restriction on state court jurisdiction, *Brown* v. *Walker,* 161 U.S., at 606–607, and we can find no distinction between the reach of congressional power with respect to commerce and its power with respect to national security. See also *Hines* v. *Davidowitz*, 312 U.S. 52.

Substantially the same rationale had been applied two years earlier in *Adams* v. *Maryland,* 347 U.S. 179, which upheld the power of Congress to preclude the states from using testimony that is compelled before a Congressional investigating committee. This Coourt there pointed out (p. 183) that "Congress has power to summon witnesses before either House or before their committees"; that "Article I of the Constitution permits Congress to pass laws 'necessary and proper' to carry into effect its power to get testimony"; that the Court was "unable to say that the means Congress has here adopted to induce witnesses to testify is not 'appropriate' and 'plainly adapted to that end' "; and that "since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by [the immunity provision], even though it affects their rules of practice."

Thus, both *Ullmann* and *Adams* rest on the rationale that, as long as Congress is acting within the scope of its constitutional authority, it may impose such restrictions "on the exercise of state power" as are "necessary and proper" "for the more effective exercise of conceded federal power." That *Ullmann* does not rest on the particular paramountcy of the defense power is further indicated by the Court's citation in *Ullmann* (p. 436) of *Brown* v. *Walker*, 161 U.S. 591, 606–607, which "upheld a similar restriction on state court jurisdiction" based on the commerce power. It also cited *Hines* v. *Davidowitz*, 312 U.S. 52, which involved the Congressional power over foreign affairs, including the treaty power, which is one of the constitutional bases of federal narcotic legislation (see *infra*, pp. 21–22).

Federal narcotic legislation rests on just as clearly "conceded federal power" (*Ullmann, supra*, at 436) as the national security legislation involved in *Ullmann*.[5] Contrary to petitioner's apparent suggestion (Br. 15), it does not rest solely on the taxing power, but also on the commerce and the treaty powers. Indeed, the power to control imports—a matter of exclusive and explicit federal authority—is the basic pillar of all federal narcotic legislation.

The first federal statute in this field, the Opium Exclusion Act of 1909 (35 Stat. 614), was sustained

[5] The constitutionality of federal narcotic legislation is well settled. *Brolan* v. *United States*, 236 U.S. 216, 218–220; *United States* v. *Doremus*, 249 U.S. 86; *Yee Hem* v. *United States*, 268 U.S. 178; *Alston* v. *United States*, 274 U.S. 289; *Nigro* v. *United States*, 276 U.S. 332; *United States* v. *Sanchez*, 340 U.S. 42.

as a valid exercise of the "plenary" power of Congress to exclude "merchandise brought from foreign countries." *Brolan* v. *United States*, 236 U.S. 216, 218, quoting *Buttfield* v. *Stranahan*, 192 U.S. 470, 492. Control of narcotics at the point of entry into the United States is so crucial to the entire federal system of regulation that for many years Congress has provided that the mere possession of narcotics creates a presumption that they have been illegally imported—a presumption which this Court upheld 35 years ago (*Yee Hem* v. *United States*, 268 U.S. 178) and to which it has frequently referred (*e.g.*, *Roviaro* v. *United States*, 353 U.S. 53, 63; *Harris* v. *United States*, 359 U.S. 19, 23). Recent Congressional investigations of the narcotic traffic have similarly emphasized the problem of the widespread smuggling of illicit drugs into the United States (S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 3–6).

Moreover, even the statutes enacted under the taxing power (the Harrison Narcotic Act of 1914, 38 Stat. 785, and its successors) were designed to implement United States treaty commitments to control international traffic in narcotics. From 1910 on, a bill imposing a tax on and regulating narcotic drugs within the United States had been urged upon Congress as a necessary step in the participation of the United States in the international drug agreements (S. Doc. No. 157, 63d Cong., 1st Sess., p. 87). And the enactment of the 1914 legislation had been preceded by a vigorous message from the President (H. Doc. No. 33, 63d Cong., 1st Sess.) pointing out that,

while other nations had supplemented the international prohibitions with domestic legislation, the United States had taken no measures for internal control of drugs.[*]

Control of narcotics is thus fundamentally a federal problem, and requires action on the national level to deal with it effectively. See *infra*, pp. 23–25. For without the federal law prohibiting the importation of unlicensed narcotics—a law which, we repeat, rests on the exclusive power of Congress over foreign commerce—adequate regulation would be virtually impossible. In these circumstances, no valid distinction can be made between *Ullmann* and this case based on the fact that *Ullmann* involved national defense and this case involves narcotics.

2. The issue here, therefore, is whether the grant of state immunity in Section 1406 is "necessary and proper for carrying into Execution" the broad Congressional authority over narcotics. As this Court long ago recognized, and as the legislative history of the Narcotic Control Act of 1956 shows, the ease with which narcotics can be concealed and the clandestine character of the traffic make it essential that there be effective enforcement powers. Section 1406, which "reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution" (*Ullmann, supra*, at 436), is an appropriate implementation of federal power in this field.

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[*] *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Calif.), sustained the constitutionality of the Opium Poppy Control Act of 1942 (21 U.S.C. 188, *et seq.*) as a valid implementation of the treaty power.

More than 30 years ago, this Court, in upholding the constitutionality of certain provisions of the Harrison Narcotic Act, pointed out that since the "importation, preparation and sale of the opiate, or other like drugs, and their transportation and concealment in small packages, are exceedingly easy and make the levy and collection of a tax thereon correspondingly difficult * * * to be efficient, a law for taxing it needs to make thorough provision for preventing and discovering evasion * * *" (*Nigro* v. *United States*, 276 U.S. 332, 343–344). Similarly, a Senate Judiciary Subcommittee, after an extensive investigation of "the narcotics problem in the United States, including ways and means of improving the Federal Criminal Code and other laws and enforcement procedures dealing with the possession, sale, and transportation of narcotics, marihuana, and similar drugs" (S. Res. 67, 84th Cong., 1st Sess.), recently reported that "big time traffickers in illicit narcotics are seldom caught and convicted, because they avoid all direct contact with the peddlers and ultimate buyers" (S. Rep. No. 1440, 84th Cong., 2d Sess., p. 7). The subcommittee concluded (*id.*, p. 2) that "[n]arcotic addiction and traffic in illicit drugs is one of the most serious problems facing the United States today"; that because of the "enormous profits" in such traffic, "Federal penalties are not sufficiently severe to deter unscrupulous persons from engaging in the traffic" (*id.*, pp. 5–6); and that it "hoped" that its investigation, together with that being conducted by a House subcommittee, "will result in the enactment of legislation and provide the basis for

appropriations necessary to remove the illicit narcotics cancer from our society" (*id.*, p. 9).

After its own investigation, a House subcommittee reached similar conclusions with respect to the seriousness of the problem and the need for legislation. H. Rep. No. 2388, 84th Cong., 2d Sess., pp. 50–75. The result was the Narcotic Control Act of 1956. The immunity provision of that statute was one of several devices designed to strengthen the enforcement of federal narcotic laws.

Separate bills were introduced in, and passed by, the Senate and then the House (S. 3760, H.R. 11619, 84th Cong., 2nd Sess.). Only the House bill contained the immunity provision.[7] It was one of several provisions that the House committee recommended in order "to permit enforcement officers to operate more effectively" (H. Rep. No. 2388, 84th Cong., 2d Sess., p. 10). In addition to providing "a statutory method to grant immunity to witnesses in cases involving a violation of the narcotic or marihuana laws" (*ibid.*), the House bill also authorized federal narcotic agents to carry firearms and to arrest with-

[7] During the House investigation, two witnesses (James C. Ryan, the Treasury Department's District Supervisor of Narcotics in New York, and Robert Tieken, the United States Attorney for the Northern District of Illinois), had recommended in general terms the granting of immunity in narcotic cases. Neither referred to the scope of such immunity. Hearings before a Subcommittee of the House Committee on Ways and Means, 84th Cong., on *Traffic In, and Control of, Narcotics, Etc.*, pp. 487, 1058, 1059. Mr. Tieken made a similar recommendation before the Senate investigation. Hearings before the Subcommittee of the Senate Judiciary Committee, 84th Cong., 1st Sess., on *Illicit Narcotics Traffic*, pp. 4285, 4342.

out a warrant, expanded the venue provisions for narcotic offenses, authorized the issuance of search warrants at night, and gave the United States the right of appeal from court orders returning seized property or suppressing evidence in narcotic cases. In conference, the latter two provisions, as well as the immunity provision, were adopted. The conference report stated (H. Rep. No. 2546, 84th Cong., 2d Sess., p. 17) that Section 1046 "provided a statutory method of granting immunity to a witness whose testimony is deemed necessary to the public interest by the United States attorney and the Attorney General, in any case involving a violation of specified Federal laws relating to narcotic drugs and marihuana."

In these circumstances, we submit that the grant of immunity from state prosecutions in 18 U.S.C. 1406 is no less "necessary and proper for carrying into Execution" the "conceded federal power" (*Ullmann* v. *United States, supra,* 350 U.S. at 436) over narcotics than the similar grant of state immunity in internal security cases sustained in *Ullmann*. Here, as in *Ullmann,* the federal authority to grant state immunity does not involve any broad-scale or general supersession of state law. State immunity is conferred only in those particular cases where the Attorney General and the United States Attorney determine that the testimony of a particular witness is "necessary to the public interest," and that he should therefore be immunized from state prosecution in order to enable the Federal Government to obtain evidence that would be

otherwise unavailable. As might be expected, such power has been sparingly exercised.[8]

3. Despite the extensive federal narcotic legislation, the states, of course, still retain substantial authority in this field. Indeed, the 1956 Act strengthened Section 8 of the Act of June 14, 1930 (46 Stat. 587, 21 U.S.C. 198), which directed the Secretary of the Treasury to "cooperate with the several States in the suppression of the abuse of narcotic drugs in their respective jurisdictions * * *." See H. Rep. No. 2546, 84th Cong., 2d Sess., p. 18. And, to the extent that such state regulation does not conflict with federal authority, it remains valid. *Whipple* v. *Martinson*, 256 U.S. 41.[9]

But the existence of this authority in the states does not invalidate federal legislation constituting an appropriate implementation of Congressional power. For, as this Court pointed out in sustaining the Harrison Narcotic Act of 1914 as a valid exercise of the taxing power, such power is not improperly exercised because "the same business may be regulated by the

[8] The Department of Justice does not maintain separate statistical records showing the number of times immunity has been conferred under Section 1406. However, examination of other Departmental records indicates that, between the effective date of the Act (July 19, 1956) and August 1, 1960, immunity thereunder has been conferred upon thirteen witnesses. There have been five other witnesses for whom the Attorney General authorized the grant of immunity, but to whom immunity was not thereafter granted.

[9] In this case, however, much of the testimony sought to be compelled from petitioner related to the illegal importation of narcotics (R. 2–7). This is a matter within the exclusive jurisdiction of the Federal Government, and not subject to concurrent jurisdiction by the states. See *supra*, pp. 20–21.

police power of the State," or "because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it." *United States* v. *Doremus*, 249 U.S. 86, 94. Accord: *United States* v. *Sanchez*, 340 U.S. 42, 44–45.[10] And,

[10] Petitioner relies heavily (Br. 12–13) upon *Tedesco* v. *United States*, 255 F. 2d 35, 39 (C.A. 6), where, in upholding a contempt conviction under 18 U.S.C. 1406, the court expressed "grave doubt that power resides with the Congress to grant immunity from prosecution in state courts pursuant to state narcotic laws * * *." The court based that statement on the fact that "both state and federal authorities have historically exercised concurrent jurisdiction in narcotic matters." But, as pointed out in the text of this brief, this fact does not invalidate the otherwise valid exercise of federal power here involved. Moreover, control over imports is within the exclusive jurisdiction of the Federal Government, and such control is one of the principal bases of federal narcotic legislation (see *supra*, pp. 20–21). Finally, the statement in *Tedesco* is dictum, since the court went on to hold (255 F. 2d at 39) that it "need not consider the point" because the contempt conviction could be affirmed on the alternative ground that the Federal Government may compel testimony by granting complete immunity from federal prosecution. See *infra*, pp. 28–33.

Petitioner also contends (Br. 16–17) that Congress, when it limited the immunity conferred in the Mann Act of 1910 to prosecution, penalty, or forfeiture "under any law of the United States," "recognized its inability to grant immunity with regard to police matters traditionally administered by the respective states." There is nothing in the legislative history, however, to indicate that this was the reason for that limitation. The immunity was granted only for reports required to be filed by persons harboring alien prostitutes. While such harboring was not then prohibited by federal law (*Keller* v. *United States*, 213 U.S. 138), Congress intended to make such harboring "practically impossible" by making those reports available to state authorities for use in state prosecutions (H. Rep. No. 47, 61st Cong., 2d Sess., p. 11; S. Rep.

once it be established that the federal legislation is within the power of Congress (as is the case here), it is the "supreme Law of the Land" to which any inconsistent state law must bow. See *Adams* v. *Maryland*, 347 U.S. 179, 183.

II

ASSUMING ARGUENDO THAT THE ACT PROVIDES IMMUNITY ONLY FROM FEDERAL PROSECUTION, IT IS NEVERTHELESS CONSTITUTIONAL

In Point I, we have argued that the judgment below can be sustained upon the ground that 18 U.S.C. 1406 constitutionally confers immunity from both state and federal prosecution. However, if the Court should disagree and hold either that the immunity does not cover state proceedings or that the grant of the state immunity is beyond the power of Congress,[11] it would then have to consider petitioner's contention (Pet. 19–36) that the Court should overrule *United States* v. *Murdock*, 284 U.S. 141, and adopt the rule that the Federal Government can compel incriminating testimony only by conferring immunity from both state and federal prosecution.

No. 886, 61st Cong., 2d Sess., p. 12.) The limited federal immunity was given to insure that persons in the District of Columbia or federal territories who filed such reports would not be prosecuted on account thereof under federal laws governing the District and territories. 45 Cong. Rec. 805, 807, 1036.

[11] Were it to hold the latter, we submit that under the broad separability provision of the Narcotic Control Act of 1956 (70 Stat. 576, 18 U.S.C. 1401, note), the immunity provision would continue in effect even though limited to federal prosecutions. *Tedesco* v. *United States*, 255 F. 2d 35, 39–40 (C.A. 6); *United States* v. *Curcio*, 278 F. 2d 95, 97 (C.A. 3).

We submit that the unanimous decision in *Murdock* is correct, and that, if the Court finds it necessary to reach the question, it should reaffirm *Murdock*.

The question in *Murdock* was whether a taxpayer was justified in refusing to furnish information to a federal official during an investigation under the internal revenue laws, where he claimed self-incrimination based on possible "violation of a state law and not the violation of a federal law" (284 U.S. at 148). The Court held that he was not. It stated (p. 149) that, under the Supremacy Clause of the Constitution, "[i]nvestigations for federal purposes may not be prevented by matters depending upon state law"; that the "English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country"; and that

> This court has held that *immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him,* and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that *full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. Counselman* v. *Hitchcock,* 142 U.S. 547. *Brown* v. *Walker,* 161 U.S. 591, 606. *Jack* v. *Kansas,* 199 U.S.

372, 381. *Hale* v. *Henkel*, 201 U.S. 43, 68. [Emphasis added.] [12]

This Court has twice reiterated this basic rationale of *Murdock*, that the Fifth Amendment was intended to protect a witness only against self-incrimination under federal law. In *Feldman* v. *United States*, 322 U.S. 487, the Court referred to the "basic principles of our federation" (p. 489) that the Fourth and Fifth "Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit" (p. 490); and it quoted (pp. 491–492), with apparent approval, the language from *Murdock* set forth in the foregoing indented paragraph. More recently, in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380, the Court stated:

> The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth.

Petitioner, relying upon criticism of *Murdock* by Professor Grant (Br. 20, n. 18; 22–23), urges that the Court in *Murdock* misinterpreted two English cases upon which it relied. But petitioner overlooks the fact that there were other, and we believe more im-

[12] In the light of this holding in *Murdock*, the contrary ruling in the early case of *United States* v. *Saline Bank*, 1 Pet. 100, and the contrary dictum in *Ballman* v *Fagin*, 200 U.S. 186, 195, upon which petitioner relies (Br. 24–26), can no longer be deemed authoritative. Both cases were called to the Court's attention in *Murdock* (284 U.S. at 143, 145).

portant, bases for the holding in *Murdock*. The Court's ultimate conclusion that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination" (284 U.S. at 149) directly rested on four leading cases: *Counselman* v. *Hitchcock*, 142 U.S. 547; *Brown* v. *Walker*, 161 U.S. 591; *Jack* v. *Kansas*, 199 U.S. 372; and *Hale* v. *Henkel*, 201 U.S. 43.[13] The Court also cited the Supremacy Clause as authority for its statement that "[i]nvestigations for federal purposes may not be prevented by matters depending upon state law." Finally, the Court had called to its attention the views of Professor Wigmore (284 U.S. at 143), who, although recognizing a division of authority upon whether the privilege was applicable where the danger of prosecution was under the laws of another jurisdiction, concluded that strong policy considerations dictated a negative answer (see Wigmore, *Evidence* (2d ed. 1923), §§ 2251, 2258).

Petitioner emphasizes (Br. 30–32) that Michigan and certain other states have adopted the rule that the state cannot compel testimony that might incriminate the witness under federal law. This rule, however, involves only the interpretation of state constitutional

[13] In *Brown* v. *Walker*, *supra*, this Court stated (161 U.S. at 608) that possible prosecution in a state court did not render the grant of immunity from federal prosecution inadequate to compel incriminating testimony, since it "was never the object of the [federal] provision [against self-incrimination] to obviate" the danger that the witness "might be subjected to the criminal laws of some other sovereignty."

and statutory provisions, and is not applicable to the federal privilege against self-incrimination. For "[t]he state statute could not, of course, prevent a prosecution of the same party under the United States statute, and it could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court for a violation of the Federal statute" (*Jack* v. *Kansas*, 199 U.S. 372, 380). And, in *Knapp* v. *Schweitzer*, *supra*, the Court rejected the contention that the State of New York violated a witness's privilege against self-incrimination under the Fifth Amendment by compelling him to testify upon the grant of immunity from state, but not from federal, prosecution.

The short of the matter is that a grant of immunity from federal prosecution is coextensive with the Fifth Amendment privilege against self-incrimination because that privilege only protects against incrimination under federal, but not under state, law. For the federal and the state governments are each supreme in their own areas, and "investigations for federal purposes may not be prevented by matters depending upon state law" (*United States* v. *Murdock*, 284 U.S. 141, 149). As was stated in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380–381:

> This Court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments. If a person may, through im-

> munized self-disclosure before a law-enforcing agency of the State, facilitate to some extent his amenability to federal process, or *vice versa*, this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere.

The basic challenge to *Murdock*—that it is unfair to permit the states to prosecute for crimes disclosed in testimony compelled by the Federal Government—can be dealt with, if appropriate, by reciprocal federal and state legislation. See the suggestion of the National Conference of Commissioners on Uniform State Laws, 9C Uniform Laws Annot. 194–195. This claim of unfairness, however, is not a valid basis for extending the federal constitutional privilege to cover possible prosecution under state law—an area that it was never intended to reach.

III

PETITIONER'S OTHER ATTACKS UPON HIS CONTEMPT CONVICTION ARE WITHOUT MERIT

In addition to challenging the constitutionality of 18 U.S.C. 1406 under the Fifth Amendment, petitioner attacks his contempt conviction on three other grounds. He contends (1) that the immunity granted was inadequate because the Government did not give him a pardon for a prior narcotic conviction for which he was then serving his sentence (Br. 37–48); (2) that the trial court should have advised him of the extent of the immunity he received under the Act (Br. 48); and (3) that the sentence of two years' imprisonment

was excessive (Br. 49). None of these contentions is valid.

A. THE GOVERNMENT WAS NOT REQUIRED, AS A CONDITION TO REQUIRING PETITIONER TO TESTIFY PURSUANT TO THE GRANT OF IMMUNITY, TO PARDON HIM FOR A PRIOR NARCOTIC CONVICTION FOR WHICH HE WAS THEN SERVING HIS SENTENCE

When petitioner was directed to testify before the grand jury, he was serving a five-year sentence under a previous conviction for conspiracy to violate the narcotic laws (see *supra,* p. 4). Relying on some general statements in *Brown* v. *Walker,* 161 U.S. 591, 601–602, where this Court, in sustaining the constitutionality of an earlier immunity statute, likened it to an amnesty statute, petitioner urges (Br. 37, see Br. 46) that he was entitled to a "general pardon or amnesty" covering the unserved portion of his imprisonment and his fine before he could be compelled to testify. He cites no authority for what the court of appeals properly characterized (R. 39, 40) as a "fantastic" and "extraordinary" contention.

Section 1406 provides that no witness compelled to testify thereunder "shall be" prosecuted or subjected to penalty or forfeiture as a result thereof. Petitioner is thus fully protected against any future prosecution for matters disclosed in his compelled testimony. No more is required to make the immunity coextensive with the privilege. "The design of the constitutional privilege is * * * to protect [the witness] against being compelled to furnish evidence to convict him of a criminal charge" (*Brown* v. *Walker,* 161 U.S. 591, 605; see *People ex. rel. Hunt* v. *Lane,* 116 N.Y.S. 990, 993–994, affirmed, 196 N.Y. 520; *Peo-*

ple v. *Fine*, 19 N.Y.S. 2d 275, 278–282), *i.e.*, to protect against future prosecution. As petitioner himself recognizes (Br. 38), the privilege was never intended to, and does not, exonerate for past convictions. The irrelevant fact, relied upon by petitioner (Br. 38, 46), that the earlier conviction was for conspiracy affords no basis for an exception to this settled principle.

B. PETITIONER'S CONVICTION OF CONTEMPT WAS NOT RENDERED INVALID BY THE FACT THAT THE TRIAL COURT DID NOT ADVISE HIM OF THE EXTENT OF THE IMMUNITY UNDER THE ACT

Upon holding petitioner in contempt, the court sentenced him to imprisonment for two years, to commence at the expiration of the sentence he was then serving (R. 34). However, recognizing that petitioner's refusal to answer the questions "when first addressed to him may have been a procedural device to secure a determination of the issue of law which he presented", the court provided that if within 60 days petitioner "purge[s] himself of his contempt by answering the questions which have been addressed to him by the Grand Jury * * * the sentence imposed herein will be vacated" (R. 34–37).

We construe the foregoing sixty-day-purge period as running from the date of final judicial disposition of this case, including the action of this Court. Petitioner plainly can suffer no prejudice from the fact that the trial court did not advise him of the extent of the immunity conferred by Section 1406. For if this Court upholds petitioner's conviction, either on the ground that he was given state immunity or that

he was required to answer because of the immunity from federal prosecution, petitioner will then have ample time within which to make an informed choice between answering the questions or going to jail.

But even if, contrary to our view, the purge period should be deemed to have expired 60 days after entry of the district court's judgment, petitioner's refusal to testify was nevertheless contemptuous. Petitioner was represented by counsel in the contempt proceedings, and it was the function of counsel, not of the court, to advise him as to his immunity. The scope of the immunity was fixed by Congress, and nothing said or done by the court could change it. The court in no way misled petitioner as to the scope of his immunity (cf. *Raley* v. *Ohio*, 360 U.S. 423), and petitioner did not request advice from the court on that issue. In these circumstances, the court was not required to explain to petitioner, prior to directing him to answer, its view as to the scope of his immunity.

C. THE SENTENCE WAS NOT EXCESSIVE

Finally, petitioner contends that his sentence of two years' imprisonment is excessive, apparently because he was then serving a five-year sentence for a prior narcotic conviction. But the two sentences were for entirely different offenses. The prior sentence was for conspiracy to violate the narcotic laws, and the instant sentence was for the contemptuous refusal to give testimony as directed by the court. The court gave petitioner two opportunities to be heard before sentence was imposed (R. 28, 34–35), and also gave him 60 days to purge himself by

answering the questions. In these circumstances, we submit that the sentence of two years' imprisonment was not an abuse of the district court's discretion. Cf. *Brown* v. *United States*, 359 U.S. 41, 52. Comparable sentences have been imposed and upheld in other narcotic contempt cases based on refusal to testify following the grant of immunity under 18 U.S.C. 1406. *Tedesco* v. *United States*, 255 F. 2d 35 (C.A. 6) (two years); *United States* v. *Curcio*, 278 F. 2d 95 (C.A. 3) (two years); *Corona* v. *United States*, 250 F. 2d 578 (C.A. 6), certiorari denied, 356 U.S. 954 (two years); *United States* v. *Pagano*, 171 F. Supp. 435 (S.D. N.Y.) (18 months).[14]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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J. F. BISHOP,
Attorneys.

SEPTEMBER 1960.

[14] The length of sentence does not appear in the *Curcio*, *Corona* or *Pagano* opinions. The information was obtained from the records of the Department of Justice.

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SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1960.

Giacomo Reina, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 19, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

The Narcotic Control Act of 1956,[1] 18 U. S. C. § 1406, legislates immunity from prosecution for a witness compelled under the section by court order to testify before a federal grand jury investigating alleged violations of the federal narcotics laws. The questions presented are, primarily, whether the section grants immunity from state, as well as federal, prosecution, and, if state immunity, whether the section is constitutional.

[1] Act of July 18, 1956, 70 Stat. 572 *et seq.*; 18 U. S. C. § 1406 *et seq.* The relevant portions of § 1406 are as follows:

"§ 1406. Immunity of witnesses.

"Whenever in the judgment of a United States Attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any violation of [certain federal narcotics statutes] is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court . . ."

The petitioner was serving a five-year sentence for a federal narcotics offense [2] when, on December 5, 1958, he was subpoenaed before a federal grand jury sitting in the Southern District of New York. A number of questions were asked him concerning his crime, particularly as to the persons involved with him and their activities in the smuggling of narcotics into this country from Europe. The petitioner invoked the provision of the Fifth Amendment against being compelled to be a witness against himself [3] and refused to answer any of the questions. The United States Attorney with the approval of the Attorney General obtained a court order pursuant to § 1406 directing him to answer. When he returned before the grand jury he again refused to testify. Proceedings against him in criminal contempt resulted in the judgment under review adjudging him guilty as charged. 170 F. Supp. 592. The Court of Appeals for the Second Circuit affirmed. 273 F. 2d 234. Because of the importance of the questions of the construction and constitutionality of § 1406 raised by the case, we granted certiorari. 362 U. S. 939.

Petitioner's main argument in both courts below and here challenges § 1406 as granting him only federal immunity, and not state immunity, either because Congress meant the statute to be thus limited, or because the statute, if construed also to grant state immunity, would be unconstitutional. Both courts below passed the question whether the statute grants state immunity because, assuming only federal immunity is granted, they held that *United States* v. *Murdock*, 284 U. S. 141, settled that the Fifth Amendment does not protect a federal wit-

[2] *United States* v. *Reina*, 242 F. 2d 302. When petitioner appeared before the grand jury on December 5, 1958, he had served about two years and eight months of his five-year term. He completed the sentence on November 21, 1959.

[3] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

ness from answering questions which might incriminate him under state law. 170 F. Supp., at 595; 273 F. 2d, at 235.' Petitioner contends that *Murdock* should be re-examined and overruled. We have no occasion to consider this contention, since in our view § 1406 constitutionally grants immunity from both federal and state prosecutions.

We consider first whether the immunity provided by § 1406 covers state, as well as federal, prosecutions. We have no doubt the section legislates immunity from both. The relevant words of the section have appeared in other immunity statutes and have been construed by this Court to cover both state and federal immunity. In *Adams* v. *Maryland*, 347 U. S. 179, a like provision in 18 U. S. C. § 3486 that the compelled testimony shall not "be used as evidence in *any* criminal proceedings . . . against him in *any* court" was held to cover both federal and state courts. [Emphasis supplied.] "The language could be no plainer," p. 181. In *Ullmann* v. *United States*, 350 U. S. 422, 434–435, 18 U. S. C. § 3486 (c), added by the Immunity Act of 1954, of which § 1406 is virtually a carbon copy, was given the same construction. Moreover, the adoption of § 1406 followed close upon the *Ullmann* decision. That decision came down on March 26, 1956. Section 1406 was reported out of the House Ways and Means Committee only three months later on June 19, 1956, H. R. Rep. No. 2388, 84th Cong., 2d Sess. It became law on July 18, 1956. 70 Stat. 574. We cannot believe that Congress would have used in § 1406 the very words construed in *Ullmann* to cover both state and federal prosecutions without giving the words the same meaning.

We turn then to the petitioner's argument that, so construed, § 1406 encroaches on the police powers reserved to the States under the Tenth Amendment. The petitioner recognizes that in *Ullmann* the Court upheld the authority of Congress to grant state immunity as "neces-

sary and proper" to carry out the power to provide for the national defense; and in *Adams* v. *Maryland* upheld the power of Congress to preclude the States from using testimony that was compelled under former § 3486 before a congressional investigating committee. He insists, however, that the congressional authority to enact narcotics laws—rested on the Commerce Clause, *Brolan* v. *United States*, 236 U. S. 216, 218; *Yee Hem* v. *United States*, 268 U. S. 178; or the taxing power, *United States* v. *Doremus*, 249 U. S. 86; *Alston* v. *United States*, 274 U. S. 289; *Nigro* v. *United States*, 276 U. S. 332, 351–354; *United States* v. *Sanchez*, 340 U. S. 42—is not broad enough to encompass the legislation of immunity against state prosecution under state narcotics laws, "a subject that has traditionally been within the police power of the states." But the petitioner misconceives the reach of the principle applied in *Ullmann* and *Adams* v. *Maryland*. Congress may legislate immunity restricting the exercise of state power to the extent necessary and proper for the more effective exercise of a granted power, and distinctions based upon the particular granted power concerned have no support in the Constitution. See *Brown* v. *Walker*, 161 U. S. 591, in which the Court upheld a federal immunity statute passed in the name of the Commerce Clause and construed that statute to apply to state prosecutions. The relevant inquiry here is thus simply whether the legislated state immunity is necessary and proper to the more effective enforcement of the undoubted power to enact the narcotics laws.

It can hardly be questioned that Congress had a rational basis for supposing that the grant of state as well as federal immunity would aid in the detection of violations and hence the more effective enforcement of the narcotics laws. The Congress has evinced serious and continuing concern over the alarming proportions to which the illicit narcotics traffic has grown. The traffic has far-reaching

national and international roots. See S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 3–6. The discovery and apprehension of those engaged in it present particularly difficult problems of law enforcement. The whole array of aids adopted in 1956, of which immunity is but one, was especially designed to "permit enforcement officers to operate more effectively." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 10. The grant of both federal and state immunity is appropriate and conducive to that end, and that is enough. Even if the grant of immunity were viewed as not absolutely necessary to the execution of the congressional design, "[T]o undertake here to inquire into the degree of . . . necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch* v. *Maryland*, 4 Wheat. 316, 423. And the supersession of state prosecution is not the less valid because the States have traditionally regulated the traffic in narcotics, although that fact has troubled one court. See *Tedesco* v. *United States*, 255 F. 2d 35. Madison said, "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws or even the Constitutions of the States." II Annals of Cong. 1897 (1791). Or as the Court has said concerning federal immunity statutes, ". . . Since Congress in the legitimate exercise of its powers enacts 'the Supreme law of the land,' state courts are bound by [§ 1406], even though it affects their rules of practice." *Adams* v. *Maryland*, *supra*, p. 183.

The petitioner urges that in any event he should not have been ordered to answer the grand jury's questions unless he first received a "general pardon or amnesty" covering the unserved portion of his sentence and his fine. This is a suprising contention, in light of the traditional

purpose of immunity statutes to protect witnesses only as to the future. It suggests that the witness who has been convicted is entitled to ask more of the Government than the witness who has not but may be compelled under § 1406 to reveal criminal conduct which, but for the immunity, would subject him to future federal or state prosecution. Yet the petitioner on his brief says that "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime . . . ." There is indeed weighty authority for that proposition. *United States* v. *Romero*, 249 F. 2d 371; 8 Wigmore, Evidence (3d ed. 1940), § 2279; cf. *Brown* v. *Walker*, *supra*, 597–600. Under it, immunity, at least from federal prosecution, need not have been offered the petitioner at all.

The petitioner does not argue that remission of his penalty was his due as a *quid pro quo* for further exposing himself to personal disgrace or opprobrium. That reason would not be tenable under *Brown* v. *Walker*, *supra*, in which the Court rejected the argument that the validity of an immunity statute should depend upon whether it shields "the witness from the personal disgrace or opprobrium attached to the disclosure of his crime." 161 U. S. 605–606. Nor does he support his contention with the argument that the prison sentence imposed for disobedience of the order directing him to testify is actually an additional punishment for his crime. His argument is the single one that "the said order was not a proper basis upon which to bottom a contempt proceeding in the face of a claim of privilege against self-incrimination *as it did not grant this petitioner immunity co-extensive with the constitutional privilege it sought to replace* . . . ." The complete answer to this is that in safeguarding him against future federal and state prosecution "for or on account of any transaction, matter or thing concerning which he

is compelled" to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker*, 161 U. S., at 601, to which petitioner refers, compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion nor elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions. This § 1406 does.

The petitioner complains finally that his sentence is excessive. The District Court sentenced him to two years' imprisonment to commence at the expiration of the sentence he was then serving. However, the court also allowed the petitioner 60 days from the date of the judgment to purge himself of his contempt by appearing within that period before the grand jury and answering the questions. It was further provided that if he did so, "The sentence herein shall be vacated." The District Court took this action because it found in effect that the petitioner asserted his legal position in good faith and was not contumaciously disrespectful of the court's order or obstinately flouting it. 170 F. Supp. 596. There is no occasion for us to consider the claim of excessiveness of the sentence, or the petitioner's companion claim that the conviction was invalid because the District Court did not advise him of the extent of the immunity conferred by § 1406. We construe the 60-day purge period as running from the effective date of this Court's mandate and the petitioner may avoid imprisonment by answering. Now that this Court has held that his fears of future state or federal prosecution are groundless, he knows that the only reason he gave for claiming his privilege has no substance. No question of an admixture of civil and criminal contempt having been raised below or here, we do not reach the issues it might present.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1960.

Giacomo Reina, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 19, 1960.]

Mr. Justice Black, with whom The Chief Justice concurs, dissenting.

The Court affirms a conviction for contempt of court upon which petitioner has been sentenced to imprisonment for two years with the provision that he can purge himself of the contempt if he answers the questions propounded to him within 60 days. This is a strange kind of sentence, apparently combining in one judgment the elements of both civil and criminal contempt. This fact alone is sufficient to arouse grave doubts in my mind as to the validity of the judgment, for the history of civil contempt and criminal contempt are quite different and call for the exercise of quite different judicial powers. Moreover, analysis of this judgment makes it clear that it rests upon the notion that petitioner has as yet committed no crime and is being sentenced for civil contempt for the sole purpose of coercing his compliance with the demand for his testimony, but that if he fails to comply with this demand within the specified period, he *will have* committed a criminal contempt. Thus the judgment seems to represent a present adjudication of guilt for a crime to be committed in the future. The fact that the judgment has not been challenged on this specific ground by petitioner does not, in my view, bar our consideration of it. Ordinarily, a judgment invalid on its face can be challenged at any time. I find it unnecessary,

however, to reach a definite conclusion on this question because, even assuming that the judgment is not invalid as a result of its hybrid nature, I still think it should be reversed.

Petitioner contends that the decision of the Court of Appeals should be reversed because the two-year sentence is excessive. That contention is sufficient to bring into issue any ground upon which the length of the sentence may open the decision to attack. Cf. *Boynton* v. *Virginia*, — U. S. —, —. I think the imposition of a two-year sentence was beyond the District Court's power in the summary proceedings it conducted in this case. In my dissenting opinion in *Green* v. *United States*, 356 U. S. 165, 193, I stated in full the reasons which led me to conclude that where the object of a proceeding is to impose punishment rather than merely to coerce compliance, "there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the State." *Id.*, at 218. I adhere to that view and reiterate my belief that the Court's position rests solely upon the fact that "judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth." *Id.*, at 219. Thus, I cannot join a decision upholding a two-year sentence for contempt upon a trial in which the accused has been denied the constitutional protections of indictment by a grand jury and determination of guilt by a petit jury. I regard this case as another ominous step in the incredible transformation and growth of the contempt power and in the consequent erosion of constitutional safeguards to the protection of liberty. I see no reason why petitioner should not have been tried in accordance with the law of the land—including the Bill of Rights—and conclude, therefore, that the case should be reversed for such a trial.